(1) Supreme Court, U.S. FILED

03 • 5 JUN 25 2003

No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DETROIT, DETROIT, L.L.C.,

Petitioner,

v.

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, a federally recognized Indian Tribe, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal Rule of Civil Procedure 24(a) allows intervention as of right upon a timely application

> when the applicant claims an interest relating to the . . . transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by the existing parties.

FRCP 24(a). The relevant case law interpreting that rule indicates that a Motion to Intervene should not be denied based on timeliness alone, but rather is to be determined from all the circumstances. The Sixth Circuit, nonetheless, made a ruling denying a Motion to Intervene based on timeliness alone and failed to take into consideration the important constitutional issues at stake in complete contradiction of the relevant case law and in conflict with several other circuit courts.

The question presented is whether a Motion to Intervene as of right pursuant to Federal Rule of Civil Procedure 24(a) may be denied based on timeliness alone.

LIST OF PARTIES AND STATEMENT PURSUANT TO RULE 29.6

The Respondents not named in the caption are: The City of Detroit, Michigan; Kwame Kilpatrick; Mary Ann Mahaffey; Kenneth V. Cockrel, Jr.; Sheila Cockrel; Brenda M. Scott; Sharon McPhail; Alberta Tinsley-Talabi; Alonzo W. Bates; Barbara Rose Collins; Kay Everett; Greektown Casino, L.L.C.; and Detroit Entertainment, L.L.C.,

Petitioner Detroit, Detroit L.L.C., has no parent corporation and no publicly held company owns 10% or more of its stock.

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Appendix A — Order Of The United States Court Of Appeals For The Sixth Circuit Dated And Filed March 28, 2003 ..... 1a

Appendix B — Rule Involved 4a

Petitioner respectfully Petitions for a Writ of Certiorari to review the Order dated March 28, 2003 of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

Petitioners Motion to Intervene which is the subject of this request for Certiorari was only ruled upon by the United States Court of Appeals Sixth Circuit and thus there is no District Court ruling in regard to same. The Court of Appeals Order (per Norris Batchelder and Gibbons, Circuit Court Judges) denied Petitioners Motion to Intervene by Order dated March 28, 2003.

STATEMENT OF JURISDICTION

The Court of Appeals entered its Order on March 28, 2003 which is reprinted in the Appendix at A. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Federal Rule of Civil Procedure 24 relevant to this Petition is reprinted in the Appendix at B.

STATEMENT OF THE CASE

In November of 1996, the Michigan Electorate approved Proposal E, a ballot initiative that authorized three casinos in the City of Detroit. Proposal E was supported financially and otherwise by intervening appellees, Atwater Entertainment Associates (hereinafter Atwater) and Greektown Casinos (hereinafter Greektown). Proposal E

granted preferences to entities that provided the most financial and political support towards the enactment of that legislation. In February of 1997, Lac Vieux Desert Band of Lake Superior Chippewa Indians (hereinafter Lac Vieux) filed a Complaint in Federal District Court for the Western District of Michigan, challenging these preferences. After Lac Vieux filed its Complaint, the Michigan Legislature amended the legislation to remove said preferences.

In June of 1997, the City of Detroit (hereinafter City) enacted an Ordinance entitled, "Casino Development Competitive Selection Ordinance" (hereinafter "Ordinance"), which is the crux of the instant litigation since in August of 1997, Lac Vieux amended its Complaint to challenge this Ordinance. Similar to the initial Proposal E, the Ordinance allowed preferential treatment for two of the three available licenses to Atwater and Greektown, based upon their financial and political support for the enactment of Proposal E.

In August of 1997, your Petitioner , Detroit, Detroit, L.L.C. (hereinafter Detroit, L.L.C.) made a bid for one of the three casino licenses available, along with several other developers. Detroit, L.L.C. was denied a casino license following the first round in the selection process. The aforesaid two favored entities qualified for the preference bestowed by the Ordinance, and that preference was later determined to be unconstitutional by the Sixth Circuit. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. The Michigan Gaming Control Board, et al.*, 276 F.3d 876 at 879 (6th Cir. 2002) (hereinafter *Lac Vieux II*). Each of those two entities, Atwater and Greektown were selected for a license. *Barden Detroit Casino, L.L.C. v. City of Detroit*, 59 F. Supp. 2d 641, at 651-652 (1999). The third entity to receive a license, MGM Grand Detroit L.L.C. (hereinafter

MGM) presented its development agreement to the city as a package which would be tied to the two preferred entities, thereby essentially assuring MGM that it would receive the one remaining license (although technically not by preference). MGM skewed its development agreement in order to tie it to the preference. The City Counsel then approved development agreements with these three entities which allowed them to build and operate temporary casino facilities. *Id* at 653. These temporary facilities have been in operation for up to three years.

The instant action was filed by Lac Vieux on February 26, 1997, which was not a participant in the bidding process, but was determined by the Sixth Circuit to be "ready and able" to participate. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board, et al.*, 172 F.3d 397 at 406 (6th Cir. 1999) (hereinafter *Lac Vieux I*). Since the initial filing, the Complaint was amended twice and the parties filed respective Motions for Summary Judgment. On January 11, 2002, the Sixth Circuit determined that the Ordinance was unconstitutional and in violation of the First Amendment's Free Speech Clause. *Lac Vieux II* at 879. The matter was remanded to the District Court for proceedings consistent with the Sixth Circuit ruling. The proposals by Lac Vieux for rectification of the harm created by the Constitutional infirmity included injunctions, conservatorship and re-bidding amongst others. The District Court then refused to take any affirmative action other than to suggest that Lac Vieux's attorney fees might be awarded. It thereafter denied a Motion for Reconsideration, causing an appeal, once again, to the Sixth Circuit.

In the interim, in April of 2002, MGM following all the rulings involving constitutionality moved to intervene.

Notwithstanding the elapse of over five years since the original filing of the instant action, the District Court summarily granted MGM's request.

Following the District Court's rejection of providing any form of relief for what the Sixth Circuit called "illegitimate" licenses (*Lac Vieux II* at 879), your Petitioner filed to intervene in the District Court in July of 2002, however it decided to withdraw the Motion when it determined that Lac Vieux would be appealing the District Court's decision and therefore intervening in the District Court would serve no useful purpose. Indeed, Lac Vieux did file a third appeal to the Sixth Circuit seeking a remedy for the harm created by the unconstitutional Ordinance. Lac Vieux in its appeal, once again, seeks to compete for a casino license and development agreement without the interference of the preference based on the unconstitutional Ordinance which "basically sought to end the high-stakes competition for two of the three Detroit casino licenses before it really began". *Lac Vieux II*, 276 F.3d at 880. Since the temporary casino facilities have already been created, common sense dictates that any new bidding process would be in regard to the construction of permanent casino facilities. On September 12, 2002, the Sixth Circuit granted Lac Vieux an injunction pending the appeal which enjoins developers from commencing construction of permanent casino facilities. (Slip op. at 3, Sixth Cir. Sept. 12, 2002). That appeal is still pending as indicated above, the matter before this Court is review of the Court of Appeal order denying your Petitioner's right to intervene. That order was entered even though only the intervening parties timely objected and even though MGM was given the right to protect its position well after the exhaustion of five years of litigation.

Pursuant to Supreme Court Rule 14.1(g)(ii), the basis for Federal jurisdiction in the Court of first instance in this matter, was based on the fact that it was an action arising under the Constitution and laws of the United States and the Federal District Court for the Western District of Michigan had jurisdiction pursuant to 28 U.S.C. § 1331. Further, the original Complaint filed in this matter was seeking a declaratory judgment and injunctive relief pursuant to 42 U.S.C. § 1983 and the Federal District Court had jurisdiction pursuant to 28 U.S.C. § 1343(3) and 28 U.S.C. § 1343(4).

On February 6, 2003, Detroit, L.L.C. filed a Motion to Intervene at the appellate level in the Sixth Circuit. Since the original filing of the Motion to Intervene was in the Sixth Circuit, this petition is actually the first request for review of that Motion on an appellate level. On March 28, 2003, the Sixth Circuit denied Detroit, L.L.C.'s Motion to Intervene. This Petition for a Writ of Certiorari followed.

REASONS FOR GRANTING THE PETITION

The Petition should be granted for three reasons. First, the Sixth Circuit order denying the Motion to Intervene sets a precedence that regardless of the rights being denied the Petitioner or those similarly situated, a party's right to intervene and protect its rights are solely discretionary. This decision, in the context of an undisputed finding of unconstitutionality has a wide spread affect, undermining the strength and vitality of the First Amendment and review should be granted to prevent this irreversible, irrevocable harm.

Second, the Sixth Circuit abused its discretion when denying Petitioner's Motion to Intervene.

Third, the Sixth Circuit's decision conflicts with holdings of this Court and other Courts as it relates to the timeliness of filing a Motion to Intervene.

I. The decision below establishes a precedence which, without any finding of prejudice to existing parties to the litigation, disregards a persons constitutionally guaranteed right to protect and preserve its First Amendment free speech guarantee.

The Supreme Court of the United States decides matters of public importance. *The Monrosa v. Carbine Black Exports, Inc.* 359 U.S. 180 at 184, 79 S. Ct. 710 (1959). A "denial of intervention as of right is reviewed de novo, except for the timeliness element, which is reviewed for an abuse of discretion." *United States v. Tennessee*, 260 F.3d 587, 592, 50 Fed. Serv. 3d 748 (2001). However in cases raising First Amendment issues "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that the 'judgment does not constitute a forbidden intrusion on the field of free expression'". *Bose Corporation v. Consumers Union of United States, Inc.* 466 U.S. 485, 499, 104 S. Ct. 1949, 1958 (1984).[1]

The Sixth Circuit in its order of March 28, 2003 denied Detroit, L.L.C.'s Motion to Intervene for no other reason other than calling it "untimely". "Untimely" in the context of Federally protected First Amendment concerns should be

1. The opinion in *Bose* is based upon an interpretation of a lower Court's findings under Federal Rule of Civil Procedure 52(a).

defined by balancing the injury and prejudice to the existing parties and the delay in proceedings, if any, with the intervenor's right to be assured adequate and full protection of its violated rights. *Januszíewicz v. Sun Ship Building & Dry Dock Company*, 677 F.2d 286, 293 (3d Cir. 1982). With such vague findings on such a highly protected area, the ruling would support non-protection of paramount constitutional rights for the sake of brevity and obscure supportive criteria. Vagueness is the essence of unconstitutional. *Plummer v. City of Columbus, Ohio*, 414 U.S. 2, 3, 94 S. Ct. 17, 18 (1973). The existing ruling promotes the perpetuation of what the city's ordinance initiated. The result of the ruling, if permitted to stand would be the potential of lack of rectification of the harm created by the ordinance through negotiation, with everyone whose federal rights were violated left with no remedy.

II. The Sixth Circuit abused its discretion when it denied Petitioner's Motion to Intervene based solely on timeliness.

It is well settled that denial of a Motion for Intervention as of right is an appealable final order. *Railroad Train Men v. Baltimore and Ohio R.R. Co.*, 331 U.S. 519, 524, 91 L. Ed. 1646, 67 S. Ct. 1387 (1947).

Although as previously stated, Petitioner believes that when important federal questions are involved the timeliness element of a Motion to Intervene is reviewed de novo, it is Petitioner's position that the Sixth Circuit abused its discretion in denying Petitioner's Motion to Intervene.[2]

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2. The Court of Appeals will find an abuse of discretion for denial of Motion to Intervene as of right only when left with the (Cont'd)

Timeliness "should be evaluated in the context of all relevant circumstances". *United States v. Tennessee*, 260 F.3d 587, 592 (2001). (*See also Usery v. Brandel*, 87 FRD 670, 674 (1980 W.D. Michigan); citing to *NAACP v. New York*, 413 U.S. 345, 366, 93 S. Ct. 2591, 2603, 37 L. Ed. 2d 648 (1972)). Intervention should not be denied if an intervening party could be readily assimilated into the case. *Usery* at 675. Absolute measures of timeliness should be ignored. *Stupak - Thrall v. Glickman*, 226 F.3d 467, 475 (6th Cir. 2002); *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994). There are "circumstances where it is proper to grant an application for post judgment intervention". *Usery* at 675.

In the instant matter the Sixth Circuit virtually ignored all the case law and provided no analysis of the circumstances surrounding the Motion to Intervene and Petitioner's interest in the lawsuit.[3] Contrary to case law in its Order of March

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(Cont'd)
definite and firm conviction that the Court committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors or where it improperly applies the law or uses an erroneous legal standard. *United States v. Tennessee*, 260F.3d 587 at 592 (2001).

3. Petitioner concedes that the Sixth Circuit correctly stated that there are five factors to consider in regard to timeliness; 1) the point to which the suit has progressed; 2) the purpose for which intervention is sought; 3) the length of time preceding the application during which the proposed Intervener knew or should have known of his interest in the case; 4) prejudice to the original parties by allowing intervention and 5) existence of unusual circumstances weighing against or in favor of intervention. *Jordan v. Michigan Conf. of Teamsters Welfare Fund*, 207 F.3d 854, 862 (6th Cir. 2000). However after stating the factors to consider, the lower Court did not make any analysis of those factors.

28, 2003, the Sixth Circuit in a five sentence paragraph simply states that it has decided that the Motion of Detroit, L.L.C. must be denied as untimely.[4] The only conclusion that can be drawn from the Sixth Circuit's decision is that the length of time that has passed was the sole basis of its decision and as such is an abuse of discretion. Given the obvious conclusion that Detroit, L.L.C., like Lac Vieux, was a "ready and able" entity affected by the unconstitutionality, it has standing. *Lac Vieux I* at 406. Since no remedy has been fashioned at this time for those entities which were ready and able, the rejection of participation in the Court only perpetuates the unconstitutional harm. At first the Court found that the preference was given for active participation in the Ordinance enactment. Now preference seems to be given by the Court to those who had active involvement in the ordinances nullification even though a remedy has yet to be determined.

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4. The relevant paragraph states as follows

> The Motion of Detroit LLC must be denied as untimely. This litigation has been pending for more than six years, with two prior appeals to this court. The district court has now entered a final judgment, which is the subject of this third appeal. Detroit LLC argues that by at least January of 2002, when this court concluded that the city ordinance was unconstitutional in *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, 276 F.3d 876 (6th Cir.), *cert. denied*, 122 S. Ct. 2589 (2002), it had standing and was aware of its interest in this litigation. Detroit LLC has not demonstrated that its motion to intervene is timely.

(See order dated March 28, 2003 reprinted in the Appendix at 3a).

III. The decision of the Sixth Circuit conflicts with the decisions of this Court and other Circuits as it relates to the timeliness of filing a Motion to Intervene.

The Sixth Circuit's decision ignores the decision of this Court which is that timeliness of a Motion to Intervene is to be determined from all the circumstances. *NAACP v. New York*, 413 U.S. 345 at 366, 93 S. Ct. 2591, 2603, 37 L. Ed. 2d 648 (1972).

Further, the Sixth Circuit's decision conflicts with several other Circuit Courts as it relates to timeliness of a Motion to Intervene. The Fifth Circuit has held that absolute measures of timeliness should be ignored, *Sierra Club v. Espy,* 18 F.3d 1202, 1205 (5th Cir. 1994).

In a 1984 decision the Ninth Circuit held that mere lapse of time alone should not be determinative of a Motion to Intervene. *United States v. State of Oregon*, 745 F.2d 550, 552 (1984). Further, the Court should consider the reason for the delay including new and expanded negotiations between the existing parties which indicates a reason to favor granting the application. *Id.*

The District of Columbia has had several cases on point which most closely resemble the stage of the proceedings at which this Petitioner sought intervention. In a recent decision that Court held that "a post judgment Motion to Intervene in order to prosecute an appeal is timely" when the potential inadequacy of representation came into existence only at that stage. *Smoke v. Norton*, 346 U.S. App. D.C. 277, 252 F.3d 468, 470 (D.C. Cir. 2001). Further, the Circuit Court for the District of Columbia has held that a request to intervene as of right should be allowed where the applicant seeks to

participate in remedial and appellate phases of the case and agrees not to reopen matters previously litigated. *Hodgson v. United Mine Workers of America*, 153 U.S. App. D.C. 407, 473 F.2d 118 (D.C. Cir. 1972); *Natural Resources Defense Counsel v. Costle*, 183 U.S. App. D.C. 11, 561 F.2d 904 at 906-907 (D.C. Cir. 1977) (in *Costle* the Court held it was an abuse of discretion to deny application for intervention where the applicants sought to participate in a settlement agreement's application).

Similarly the Third Circuit has held that where intervention is sought not to reopen proceedings that would otherwise remain closed but to participate in an upcoming phase of the litigation intervention is appropriate and timely as long as there is no undo prejudice to the existing parties. *Janusziewicz v. Sun Ship Building & Dry Dock Company*, 677 F.2d 286, 293 (3d Cir. 1982).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED AND FILED MARCH 28, 2003

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 02-1893/1996

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, a federally recognized Indian Tribe,

Plaintiff-Appellant/Cross-Appellee,

v.

THE CITY OF DETROIT, MICHIGAN; KWAME KILPATRICK; MARY ANN MAHAFFEY; KENNETH V. COCKREL, JR.; SHEILA COCKREL; BRENDA M. SCOTT; SHARON MCPHAIL; ALBERTA TINSLEY-TALABI; ALONZO W. BATES; BARBARA ROSE COLLINS; KAY EVERETT,

Defendants-Appellees,

ATWATER ENTERTAINMENT ASSOCIATES, L.L.C.; GREEKTOWN CASINO, L.L.C.; DETROIT ENTERTAINMENT, L.L.C.,

Intervenors-Appellees,

MGM GRAND DETROIT, L.L.C.,

Intervenor-Appellee/Cross-Appellant,

MICHIGAN GAMING CONTROL BOARD,

Amicus Curiae.

Appendix A

ORDER

Before: NORRIS, BATCHELDER, and GIBBONS, Circuit Judges.

The plaintiff appeals the denial of its motion for additional relief in this declaratory judgment action in which the district court found that a Detroit ordinance governing the selection of three casino developers was unconstitutional. Intervenor MGM Grand Detroit, L.L.C. ("MGM") cross appeals the denial of its motion for summary judgment as moot. On February 6, 2003, Detroit, Detroit, L.L.C. ("Detroit, LLC"), an unsuccessful bidder, filed a motion to intervene in these appeals. The parties oppose the motion to intervene. In addition, the plaintiff moves for expedited consideration of the motion.

Although there is no appellate rule governing Detroit LLC's motion to intervene on appeal, it is generally accepted that the courts of appeals have discretion to grant intervention. The standards for intervention set forth in Fed. R. Civ. P. 24 provide guidance for the exercise of our discretion. Both intervention as of right and permissive intervention require that the application to intervene be timely. *See Stupak-Thrall v. Glickman*, 226 F.3d 467, 472-73 (6th Cir. 2000); *Jordan v. Michigan Conf. of Teamsters Welfare Fund*, 207 F.3d 854, 862 (6th Cir. 2000); *Cuyahoga Valley Ry. Co. v. Tracy*, 6 F.3d 389, 395 (6th Cir. 1993). "The question of timeliness is considered with regard to five factors: 1) the point to which the suit has progressed; 2) the purpose for which the intervention is sought; 3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case; 4) the prejudice to the original parties due to the

proposed intervenor's failure, after he or she knew or reasonably should have known of his interest in the case, to apply promptly for intervention; and 5) the existence of unusual circumstances militating against or in favor of intervention." *Jordan v. Michigan Conf. of Teamsters Welfare Fund*, 207 F.3d at 862.

The motion of Detroit LLC must be denied as untimely. This litigation has been pending for more than six years, with two prior appeals to this court. The district court has now entered a final judgment, which is the subject of this third appeal. Detroit LLC argues that by at least January of 2002, when this court concluded that the city ordinance was unconstitutional in *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, 276 F.3d 876 (6th Cir.), *cert. denied*, 122 S. Ct. 2589 (2002), it had standing and was aware of its interests in this litigation. Detroit LLC has not demonstrated that its motion to intervene is timely.

The plaintiff s motion to expedite a ruling is **GRANTED**, and the motion to intervene is **DENIED**.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Clerk

APPENDIX B — RULE INVOLVED

UNITED STATES CODE ANNOTATED
FEDERAL RULES OF CIVIL PROCEDURE FOR THE
UNITED STATES DISTRICT COURTS
IV. PARTIES
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Amendments received to 05-23-03

Rule 24. Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made

pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403. When the constitutionality of any statute of a State affecting the public interest is drawn in question in any action in which that State or any agency, officer, or employee thereof is not a party, the court shall notify the attorney general of the State as provided in Title 28, U.S.C. § 2403. A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.

No. 03-5

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In The
Supreme Court of the United States

DETROIT, DETROIT, L.L.C.,

Petitioner,

v.

LAC VIEUX DESERT BAND OF
LAKE SUPERIOR CHIPPEWA INDIANS,
a federally recognized Indian Tribe, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondents submit that the following question more accurately reflects the lack of merit and significance of Petitioner's Petition for Writ of Certiorari:

> Did the Court of Appeals correctly deny Petitioner's motion to intervene as untimely, given that Petitioner moved for intervention in the first instance with the Court of Appeals, after six years of litigation, final judgment and three appeals, all during which it was aware of its purported interests in the litigation?

LIST OF PARTIES

Petitioner Below:

Detroit, Detroit, L.L.C.

Respondents Below:

Atwater Entertainment Associates, L.L.C.
Detroit Entertainment, L.L.C.
City of Detroit
Detroit City Council
MGM Grand Detroit, L.L.C.
Greektown Casino, L.L.C.
Lac Vieux Desert Band of Lake Superior Chippewa Indians

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Atwater Entertainment Associates, L.L.C. is a member of Detroit Entertainment, L.L.C. Circus Circus Michigan, Inc., a wholly owned subsidiary of Mandalay Resort Group (a publicly owned corporation), is also a member of Detroit Entertainment, L.L.C.

There is no publicly held corporation owning stock in Greektown Casino, L.L.C.

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Respondents, Atwater Entertainment Associates, L.L.C. ("Atwater"), Detroit Entertainment, L.L.C. ("Detroit Entertainment") and Greektown Casino, L.L.C., ("Greektown"), respectfully request that this Court deny Petitioner Detroit, Detroit, L.L.C.'s *Petition for a Writ of Certiorari* (June 30, 2003) ("Petition"), seeking review of the Order of the United States Court of Appeals for the Sixth Circuit dated March 28, 2003 (Appendix A to Petition) ("Order").

STATEMENT OF THE CASE

In November of 1996, the electorate of the State of Michigan voted to approve an initiative authorizing casino gaming in the City of Detroit. The Michigan Legislature later codified that initiative as the Michigan Gaming Control and Revenue Act, Mich. Comp. Laws § 432.201, *et seq.* ("Gaming Act"). To implement the Gaming Act at the city level, the Detroit City Council adopted the Casino Development Competitive Selection Process Ordinance on June 18, 1997 ("Ordinance"). The Ordinance included a potential preference which the Mayor of Detroit was permitted to apply as a tie-breaker in the selection process. Only Atwater and Greektown were eligible for the preference.

On February 25, 1997, Lac Vieux Desert Band of Lake Superior Chippewa Indians ("LVD") filed this action against the Michigan Gaming Control Board ("MGCB") and its members, the City of Detroit, its Mayor and City Council members, seeking to declare the Gaming Act unconstitutional in six separate counts. Atwater and Greektown intervened on May 19, 1997. LVD later

amended its complaint to include a challenge to the Ordinance.

On June 23, 1997, the City issued its Request for Proposals/Qualifications ("RFP/Q") Phase I. As part of the RFP/Q Phase I, each of the 11 competing developers, including Petitioner, were required to sign a comprehensive release of all claims relating to the selection process. On August 1, 1997, the 11 applicants submitted a response to the RFP/Q Phase I. Petitioner was eliminated in that first round.

Following submission of the RFP/Q Phase II and a second round of eliminations, the Mayor announced the winners of the selection process: Detroit Entertainment[1], Greektown and MGM Grand Detroit, L.L.C. The Mayor did not apply the preference to select Detroit Entertainment, although he did apply the preference to select Greektown over the fourth semi-finalist, Mirage Resorts, Inc. The selected developers subsequently entered into development agreements with the City and became licensed by the MGCB to conduct casino gaming within the City of Detroit. All three are currently operating casinos in Detroit and have been for several years..

As the City moved forward with its casino project, LVD's case against the City and other defendants progressed as well. On April 12, 1999, the Sixth Circuit Court

[1] Detroit Entertainment, formed on July 15, 1997, consists of Circus Circus Michigan, Inc. and Atwater Casino Group, L.L.C. Atwater Casino Group, L.L.C. is comprised of Atwater and ZRX, L.L.C. Although Atwater was eligible to receive a preference under the Ordinance, Detroit Entertainment was not and did not.

of Appeals held that LVD had standing to challenge the Ordinance but lacked standing with regard to the Gaming Act. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, 172 F.3d 397 (6th Cir. 1999) ("*Lac Vieux I*"). The Sixth Circuit also concluded that the preference provisions of the Ordinance implicated the First Amendment and were content-based restrictions subject to strict scrutiny review. *Id.* at 409.

On remand, the district court determined that the Ordinance survived strict scrutiny. The Sixth Circuit reversed that decision on January 11, 2002. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, 276 F.3d 876 (6th Cir. 2002), *cert. denied*, 536 U.S. 923 (2002) ("*Lac Vieux II*"). Following *Lac Vieux II*, the district court issued an order declaring the Ordinance unconstitutional in its current form. LVD then filed a motion for further relief in which it argued that because the Ordinance was unconstitutional, the district court was required to enjoin the current developers from operating their casinos and compel the City to conduct a new competitive bidding process. The district court denied LVD's motion on July 9, 2002, and LVD appealed the decision of the district court to the Sixth Circuit for a third time. That appeal is currently pending.

Despite signing a release and delaying 51/2 years, Petitioner filed a motion to intervene with the district court on July 15, 2002. On its own motion, the Petitioner withdrew its intervention motion 14 days later. On February 6, 2003, Petitioner filed a motion to intervene with the Sixth Circuit. In that motion, Petitioner conceded that it was barred by the release from initiating this action, but contended that nonetheless it was somehow now entitled to partake in any remedy that may be ordered. After

extensive briefing, the Sixth Circuit denied Petitioner's motion to intervene as untimely. Petitioner now asks this Court to review the Sixth Circuit's decision.

REASONS FOR DENYING THE PETITION

The Court should deny the Petitioner's request for review of the Sixth Circuit's decision denying intervention for three reasons. First, the Petitioner has misstated both the Sixth Circuit's decision and the law on intervention in a transparent attempt to transform its insignificant Petition into something worthy of review by this Court. Second, contrary to Petitioner's bald assertion, the Sixth Circuit's Order does not conflict with decisions of this Court or other circuit courts. Indeed, the Order is perfectly consistent with all relevant precedent. Finally, review is improper because the Sixth Circuit fully considered and correctly denied Petitioner's intervention motion.

I. In its attempt to create significance where none exists, Petitioner both misstates the applicable standard of review and mischaracterizes the Sixth Circuit Court of Appeals' holding.

Petitioner misstates the law in its Petition by asserting that the standard of review is *de novo* when, in fact, it is well-established that denials of intervention for timeliness are reviewed for an abuse of discretion. *NAACP v. New York,* 413 U.S. 345, 366 (1973). Petitioner cites *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), in support of its claim that the standard of review is *de novo*. *Bose,* however, merely holds that an appellate

court reviewing a district court's findings in a First Amendment case must independently review the record to determine whether there has been a violation of the First Amendment. *Id.* at 514. Petitioner does not seek review of the Sixth Circuit's findings that its First Amendment rights were violated, for the Sixth Circuit made no such findings. Rather, Petitioner seeks review of the Sixth Circuit's denial of its motion to intervene. Although Petitioner cryptically suggests that the denial of intervention by the Sixth Circuit somehow implicates its First Amendment rights and therefore requires review under a lower standard, Petitioner provides no real analysis or support for such a proposition.[2] Even though the underlying case involves the First Amendment, Petitioner's motion for intervention is obviously not governed by First Amendment principles and standards. The only relevant standards are those pertinent to a motion to intervene, which are the exact standards applied by the Sixth Circuit in its Order.

In addition to misstating the standard of review, Petitioner also seriously mischaracterizes the Sixth Circuit's Order. Petitioner first asserts that the Sixth Circuit "virtually ignored all the case law," when in the same breath, it admits that the Sixth Circuit correctly cited the five factors to consider in regard to timeliness. Petition at 8, 8 n.3. Additionally, Petitioner claims that the Sixth Circuit's Order was "[c]ontrary to case law" simply

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[2] Despite its assertion that the standard of review is *de novo*, Petitioner implicitly acknowledges the weakness of its argument by analyzing the Sixth Circuit's decision pursuant to the higher standard, abuse of discretion.

because the Sixth Circuit's Order was short and to the point – as if the case law mandates that decisions on timeliness be a certain length, which it obviously does not. *See* Petition at 8-9. Finally, based solely on the length of the Sixth Circuit's Order, the Petitioner states that "[t]he only conclusion that can be drawn from the Sixth Circuit's decision is that the length of time that has passed was the sole basis of its decision and as such is an abuse of discretion." Petition at 9. Quite the contrary, the Order's brevity reflects Petitioner's patent failure to meet the timeliness standard. *See* Part III, *infra*. Petitioner further mischaracterizes the Sixth Circuit's decision as vague and contrary to law, when its only defining characteristic is succinctness. (Indeed, Petitioner argues that because the Order is supposedly "vague", the Order itself must be unconstitutional).

II. Contrary to Petitioner's assertion, the decision below does not conflict with the decisions of this Court or other circuit courts.

In a desperate attempt to create the appearance of importance, Petitioner erroneously claims that the Sixth Circuit's decision conflicts with decisions of this Court. In support of this assertion, Petitioner cites only one Supreme Court decision, *NAACP*, 413 U.S. 345, in which this Court held that timeliness is to be determined from all the circumstances. *Id.* at 366. While Petitioner correctly cites *NAACP*, Petitioner fails to demonstrate that the Sixth Circuit did not take into consideration all the relevant circumstances when issuing its decision on the timeliness of Petitioner's intervention motion. As Petitioner admits, the Sixth Circuit's Order correctly describes the factors which affect timeliness, Petition at 8 n.3, and the Court's

decision is not contrary to any of those factors.[3] In truth, *NAACP* supports rather than contradicts the Sixth Circuit's decision by holding that "if [a motion to intervene] is untimely, *intervention must be denied.*" 413 U.S. at 365 (emphasis added).

Petitioner also claims that the Sixth Circuit's Order conflicts with other circuit court decisions. This contention is simply wrong. The factors considered by the Sixth Circuit for determining timeliness, which were correctly set forth in the Order, are entirely consistent with the factors listed in cases from other circuits, including those cases cited by Petitioner. Compare *Jordan v. Michigan Conf. of Teamsters Welfare Fund,* 207 F.3d 854, 862 (6th Cir. 2000) to *e.g., Sierra Club v. Espy*, 18 F.3d 1202, 1204-05 (5th Cir. 1994); *United States v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984); *Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001). Furthermore, nearly all Circuit courts have shown reluctance to allow intervention when the applicant was aware of the litigation but delayed in seeking to intervene, as in this case. *See, e.g., American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co.*, 112 F.2d 669, 670 (2nd Cir. 1940); *In re Fine Paper Antitrust Litig.*, 695 F.2d 494, 501 (3rd Cir. 1982); *Jones v.*

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[3] Moreover, assuming arguendo that the Sixth Circuit's decision did not take into account all of the relevant circumstances as required by *NAACP*, the Court's error would merely "consist[ ] of the misapplication of a properly stated rule of law." S. Ct. R. 10. While conceding that the Sixth Circuit's Order states the proper law on timeliness for intervention, Petitioner's basic complaint is that the court failed to apply the factors to its case. Petitioner at 8 n.3, 8-9. Even if this were the case, which Respondents dispute, such misapplication of the law does not merit review by this Court.

Caddo Parish School Bd., 704 F.2d 206, 219 (5th Cir. 1983); *Michigan Ass'n for Retarded Citizens v. Smith*, 657 F.2d 102, 105 (6th Cir. 1981); *FDIC v. Hanrahan*, 612 F.2d 1051, 1053 (7th Cir. 1980); *EEOC v. Westinghouse Elec. Corp.*, 675 F.2d 164, 165-66 (8th Cir. 1982); *Petrol Stops Northwest v. Continental Oil Co.*, 647 F.2d 1005, 1010 (9th Cir. 1981); *United States v. Jefferson County*, 720 F.2d 1511, 1516-17 (11th Cir. 1983); *Moten v. Bricklayers, Masons & Plasterers Int'l Union of America*, 543 F.2d 224, 228 (D.C. Cir. 1976).[4]

III. The Sixth Circuit fully considered Petitioner's motion to intervene and correctly denied that motion.

In addition to the insignificance of the issues raised in the Petition, this Court should deny Petitioner's request for review because the Sixth Circuit fully considered and properly denied the Petitioner's intervention motion.

The threshold requirement for intervention under Rule 24(a)(2) of the Federal Rules of Civil Procedure is timeliness of the application to intervene.[5] Considering the

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[4] Even if the Sixth Circuit did not consider all the relevant circumstances, which Respondents do not concede, there is still no conflict between the Circuits which this Court need resolve. The Sixth Circuit's view of timeliness under Rule 24(a)(2) is squarely in line with other Circuits. *Id.*

[5] Although the Federal Rules of Civil Procedure apply only in district court, the Sixth Circuit properly looked to FED. R. CIV. P. 24(a)(2) for guidance, since there is no appellate rule or Sixth Circuit rule governing intervention on appeal. *See International Union, United Auto., Aerospace and Agric. Implement Workers of America AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965). Although the Sixth

(Continued on following page)

Sixth Circuit's five factors for timeliness, Petitioner's intervention motion was unquestionably belated.[6]

First, by the time Petitioner moved to intervene in the case, final judgment had been entered. The Ordinance had been declared unconstitutional and LVD had been awarded fees. After extensive briefing and a lengthy show cause hearing, the district court denied LVD any further relief. Petitioner waited until this hearing was over, final judgment was entered and the case was on its third appeal to the Sixth Circuit before moving to intervene. As recognized by the Sixth Circuit, this factor weighed heavily against allowing intervention. *See* Order ("This litigation has been pending for more than six years, with two prior appeals to this Court. The district court has now entered a final judgment, which is the subject of this third appeal.") *See also United States v. Tennessee*, 260 F.3d 587, 592 (6th Cir. 2001).

Circuit has not addressed the standard for intervention on appeal, several circuit courts have adopted a higher standard than that applied by the district courts. *See, e.g., Hutchinson v. Pfeil*, 211 F.3d 515, 519 (10th Cir. 2000) ("A court of appeals may, but only in an exceptional case for imperative reasons, permit intervention where none was sought in the district court").

[6] The five factors include:

> (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenors knew or should have known of their interest in the case; (4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and (5) the existence of unusual circumstances militating against or in favor of intervention.

Stupak-Thrall v. Glickman, 226 F.3d 467, 473 (6th Cir. 2000).

Second, Petitioner's purpose for intervention is clearly improper. Petitioner seeks to intervene to partake in any settlement or remedy which may occur at this late stage of the proceedings. In other words, Petitioner is seeking to intervene to reap whatever benefit LVD may achieve after six expensive and contentious years of litigation. Yet, by signing the release prior to submitting a bid and competing in the selection process, Petitioner unquestionably forfeited any rights to a remedy in this case. *See Barden Detroit Casino, L.L.C. v. City of Detroit*, 59 F. Supp.2d 641 (E.D. Mich. 1999), *aff'd,* 230 F.3d 848 (6th Cir. 2000). Because Petitioner has no right to any benefits resulting from this litigation, its purpose for intervening is illegitimate.

Third, Petitioner knew about this case from its inception – which was six years prior to its intervention motion – yet never requested to intervene in the district court, and only moved to intervene in the Sixth Circuit in February 2003. Petitioner argued that it was not dilatory in filing its intervention motion because it only gained standing once the Sixth Circuit ruled the Ordinance unconstitutional. Even if this erroneous and unsupported theory were accepted, under Petitioner's own logic it should have moved to intervene in January 2002, when *Lac Vieux II* was issued, rather than February 2003. This fact was recognized by the Sixth Circuit in its Order. ("Detroit L.L.C. argues that by at least January of 2002, when this Court concluded that the City Ordinance was unconstitutional in *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board*, 276 F.3d 876 (6th Cir.), *cert. denied*, 122 S.Ct. 258 (2000), it had standing and was aware of its interests in this litigation.").

Fourth, Petitioner's intervention would cause severe harm to the other parties. It would invite every disappointed or "potential" bidder for a Detroit casino to intervene in the pending appeal. The result would be a barrage of briefs and new issues to further complicate and delay this matter.

Finally, Petitioner failed to identify any unusual circumstances that would suggest it should be entitled to intervene at this late stage of the proceedings.

In finding that Petitioner's intervention was untimely, the Sixth Circuit did not need to reach the other factors for intervention. *See NAACP*, 413 U.S. at 365. It is worth noting, however, that Petitioner fails to satisfy those requirements as well.[7] Petitioner has no right to a remedy in this case since it was barred both by the release it signed and the standing doctrine from bringing an action in this case. It therefore has no substantial legal interest in the subject matter of this litigation. *See Barden Detroit Casino, supra*. Because Petitioner has no substantial legal interest, intervention is not required to protect whatever interest Petitioner claims, and such interest does not require representation.

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[7] In addition to timeliness, the elements for intervention include:

> (1) the applicant's substantial legal interest in the case; (2) the impairment of the applicant's ability to protect that interest in the absence of intervention; and (3) inadequate representation of that interest by parties already before the court.

Michigan State AFL-CIO v. Miller, 103 F.3d 1240, 1245 (6th Cir. 1997).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 03-5

In The
Supreme Court of the United States

DETROIT, DETROIT, L.L.C.,

Petitioner,

v.

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

The opinions of the Court of Appeals for the Sixth Circuit in Case No. 02-1893 dated September 12, 2002 and March 28, 2003, are unreported and reproduced in Respondent's Appendix ("Resp't App.") at 1-3 and Petitioner's Appendix ("Pet. App.") at 1a-3a, respectively.

OTHER RELEVANT MATERIAL

Prior opinion of the Court of Appeals for the Sixth Circuit are reported at 276 F.3d 876 (6th Cir. 2002) (Case No. 00-1879) and 172 F.3d 397 (6th Cir. 1999) (Case No. 97-2249), and are reproduced in Resp't App. at 4-17, and 18-44, respectively; and the Sixth Circuit's Docket Sheet and Petitioner's Supplemental Reply in Favor of its Motion to Intervene, filed on March 3, 2003, are unreported and reproduced in Resp't App. at 45-47, and 48-55, respectively.

JURISDICTION

The Court of Appeals for the Sixth Circuit entered its Order on March 28, 2003. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

COUNTER-STATEMENT OF THE CASE

A. Introduction

The Petition for Certiorari fails to satisfy any of the classic criteria for the issuance of the writ. The decision

below does not create a conflict in authority: It does not conflict with any opinion from any other federal court of appeals (or, for that matter, from any state court of last resort). The decision below does not conflict with this Court's precedents. Furthermore, contrary to Petitioner's claims, the Sixth Circuit did not abuse its discretion in denying Petitioner's Motion to Intervene. Accordingly, the Petition should be denied.

B. Factual Background

Respondent Lac Vieux Desert Band of Lake Superior Chippewa Indians (hereinafter "Lac Vieux" or "Tribe") is a federally-recognized Indian tribe located in Michigan's Upper Peninsula, and is the sole Plaintiff in the underlying case. Resp't App. 20. The underlying case involves Lac Vieux's challenge to a Detroit City Ordinance ("Ordinance") that creates preferences in the competition for lucrative casino developments based on the content of the competitor's political speech. Rather than participate in the unconstitutional selection process, Respondent Lac Vieux filed the underlying action in February 1997. In August of 1997, Petitioner Detroit, Detroit, L.L.C. (hereinafter "Detroit LLC") submitted a bid for one of these developments/licenses, but was denied a license. Pet't Pet. 2. Like every other developer who submitted a proposal, Petitioner signed a "Consent and Release," which effectively released the City from all claims against it arising out of the selection process. *See Barden Detroit Casino L.L.C. v. Detroit*, 59 F.Supp.2d 641 (E.D. Mich. 1999) (upholding validity of the waiver), *aff'd on other grounds*, 230 F.3d 848 (6th Cir. 2000). One district court has already found, and the Sixth Circuit did not disturb on appeal, that this Consent and Release constitutes a release of any damages or claims,

including constitutional challenges. *Id.* at 658, 666; *Barden Detroit Casino, L.L.C. v. Detroit*, 230 F.3d 848, 857 (6th Cir. 2000).

Respondent filed the underlying case at bar challenging the Ordinance on February 26, 1997, yet Petitioner Detroit LLC waited until February 3, 2003 to seek to intervene in this matter.

C. Proceedings Below

In February 1997, Respondent Lac Vieux filed suit against the Michigan Gaming Control Board ("Board"), the City of Detroit, and the Mayor of Detroit, seeking to have the Ordinance declared unconstitutional. Resp't App. 22. In pertinent part, Respondent claimed that the Ordinance violated the free speech clause of the First Amendment by awarding preferences to parties "for their political support of a particular side of a controversial political issue." Resp't App. 25-26. Two entities, Atwater Entertainment Associates, L.L.C. and Greektown Casino, L.L.C., qualified for the preferences being challenged in this lawsuit. These two entities were allowed to intervene in May 1997. Resp't App. 22. Thereafter, the parties filed cross-motions for summary judgment. The district court granted the Defendants and Intervenors' Motion for Summary Judgment. Resp't App. 26-27.

On April 12, 1999, the Sixth Circuit reversed. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board*, 172 F.3d 397 (6th Cir. 1999) ("*Lac Vieux I*"); Resp't App. 20. The Sixth Circuit held that the Ordinance does implicate the First Amendment and remanded to the district court to determine if the Ordinance could satisfy strict scrutiny review. *Id.*; Resp't App. 44. On remand, the district court dismissed

Respondent Lac Vieux's case once again, finding that the Ordinance passed muster under strict scrutiny review.

On January 11, 2002, the Sixth Circuit reversed and remanded a second time, holding that the Ordinance is fatally unfair and is not the least restrictive way to achieve any compelling state interest. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board*, 276 F.3d 876 (6th Cir. 2002) ("*Lac Vieux II*"); Resp't App. 10-11. On April 12, 2002, the City of Detroit filed a Petition for Writ of Certiorari with this Court, challenging the Sixth Circuit's January 11, 2002 Judgment. This Court denied the Petition. *Detroit v. Lac Vieux Desert Band of Lake Superior Chippewa Indians*, 122 S.Ct. 2589 (2002).

On remand from *Lac Vieux II*, the district court declared that the Ordinance is unconstitutional, but denied Respondent Lac Vieux's request for additional relief. Currently, this case is pending before the Sixth Circuit on appeal for the third time. The court of appeals has entered an injunction pending appeal, and has ordered the case to be heard on an expedited basis. Resp't App. 3. Briefing was completed on July 16, 2003. The sole issue before the Sixth Circuit is whether the district court erroneously denied Respondent Lac Vieux's request for further relief.

Petitioner Detroit LLC failed to seek intervention in the present case until six years after this case was filed. Pet. App. 3a. It is undisputed that Petitioner has had knowledge of this case from its inception, that it participated in the City's casino developer selection process, and executed a "Consent and Release." The Consent and Release has been construed by at least one federal court to

be a waiver of the participants' right to challenge the constitutionality of the City's selection process. *Barden Detroit Casino L.L.C. v. Detroit*, 59 F.Supp.2d 641 (E.D. Mich. 1999) (upholding validity of the waiver), *aff'd on other grounds*, 230 F.3d 848 (6th Cir. 2000).

Petitioner argues that once it did seek to intervene in this case, Respondent Lac Vieux did not timely object. The only objection, Petitioner argues, came from the two previous Intervenors. Pet't Pet. 4. This is simply not so. Respondent Lac Vieux *did* timely file a Brief Opposing Detroit LLC's Motion to Intervene with the Sixth Circuit.[1]

The Sixth Circuit denied Petitioner's Motion to Intervene, determining that its Motion was not timely. Pet. App. 3a. The Sixth Circuit reasoned that the Motion was untimely because: (1) the litigation has been pending for more than six years; (2) there have already been two appeals to the Sixth Circuit (in which Petitioner Detroit LLC could have sought to participate, but failed to do so); and (3) final judgment has been entered in the case. *Id.* The Sixth Circuit also considered the date which Petitioner had standing to intervene and was aware of its interests in the litigation. *Id.*

[1] The Sixth Circuit's docket sheet for *Lac Vieux v. Detroit*, No. 02-1893/1996, indicates that the Court received Respondent Lac Vieux's Opposition on February 18, 2003, which was timely. Resp't App. 45-47. In fact, Petitioner filed a Supplemental Reply in Favor of its Motion to Intervene on March 3, 2003, specifically noting that it received Respondent Lac Vieux's Opposition. Resp't App. 48-55.

REASONS THE PETITION SHOULD BE DENIED

The Petition should be denied for the following reasons. First, the Sixth Circuit's Opinion creates no conflict with this Court's precedent or rulings in other circuits. Second, the Sixth Circuit did not abuse its discretion in denying Petitioner's Motion to Intervene.

I. The Sixth Circuit's decision has created no conflict in authority.

Petitioner has not presented any argument to substantiate its assertion that the Sixth Circuit, through its denial of Petitioner's Motion to Intervene, has brought itself into conflict with a decision of this Court, a sister court of appeals or any state court of last resort. Contrary to Petitioner's assertion, the Sixth Circuit's decision is in accord with this Court's decision in *NAACP v. New York*, 413 U.S. 345 (1973), as well as other circuits' decisions.

In *NAACP*, this Court determined that:

> If it [the motion to intervene] is untimely, intervention must be denied. Thus, the court where the action is pending must be satisfied as to timeliness. Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion: unless that discretion is abused, the court's ruling will not be disturbed on review.

Id. at 365. The Court then concluded that the district court's denial of the motion to intervene was proper because the lower court "could reasonably have concluded

that appellants knew or should have known of the pendancy of the . . . action"; "the record amply demonstrates that appellants failed to protect their interest in a timely fashion"; and "[i]t is apparent that there were no unusual circumstances warranting intervention." *Id.* at 366-70.

The Sixth Circuit's determination in this case is right on point – and surely presents no conflict – with this Court's decision in *NAACP*. As in *NAACP*, the Sixth Circuit could have reasonably concluded that Petitioner should have known of the pendency of this action. In fact, Petitioner Detroit LLC actually participated in the selection process that Respondent Lac Vieux challenged in 1997. Moreover, Petitioner does not claim it was unaware of the litigation. Also as in *NAACP*, the record amply demonstrates that the Petitioner failed to protect its interest in a timely fashion. Petitioner did not move to intervene for over six years – until this case was on appeal for the third time after the district court's final disposition. Finally, as in *NAACP*, there are no unusual circumstances warranting intervention in this case.

Likewise, the Sixth Circuit's determination in this case does not create a circuit split. The circuit court cases that Petitioner cites in its Petition as allegedly giving rise to a circuit split are limited by their facts, and/or do not stand in conflict with the Sixth Circuit's decision below. First, Petitioner cites *Sierra Club v. Espy*, 18 F.3d 1202 (5th Cir. 1994), for the proposition that absolute measures of timeliness are not proper. Here, the Sixth Circuit did not apply an absolute measure of timeliness, but rather considered various factors, such as the point to which the suit has progressed, the circumstances militating against intervention and the length of time preceding the application during which Petitioner should have known of its

interest. There is no conflict between the case at bar and *Sierra Club*.

Petitioner also cites *United States v. Oregon*, 745 F.2d 550 (9th Cir. 1984), for the proposition that the mere length of time is not determinative of whether a motion to intervene should be granted, and that new and expanded negotiations may militate in favor of intervention. Again, the Sixth Circuit did not deny Petitioner's Motion to Intervene based on the lapse of time. Furthermore, Petitioner's assertion that expanded negotiations militate in favor of intervention in this case is inaccurate. The parties to this litigation have been involved in negotiations throughout the six-year duration of this case. The fact that the parties were involved in negotiations at the time Petitioner sought to intervene is not a new phenomenon that warrants intervention. There is no conflict between the case at bar and *United States v. Oregon*.

Next, the Petitioner cites two District of Columbia Circuit Court opinions to support its proposition that it is an abuse of discretion to deny intervention at this stage in the litigation. These cases are distinguishable and do not conflict with the case at bar. *Hodgson v. United Mine Workers of America*, 473 F.2d 118 (D.C. Cir. 1972), involved a suit brought under the Labor-Management Reporting Act, wherein the Secretary of Labor filed action against the union based on complaints by the union's members that the union trusteeships were unlawful. *Id.* at 121. The district court determined that the trusteeships were, in fact, invalid and requested that the Secretary file a proposed decree to fashion the relief. *Id.* at 126. Prior to the district court's entry of its order, the union members that had filed the written complaints with the Secretary moved

to intervene. *Id.* at 122. The district court denied intervention, but the circuit court reversed. *Id.* at 121. The court held that while the motion to intervene was pending, two events occurred which warranted intervention. *Id.* at 126.

The first event was the district court's entry of judgment in that case. *Id.* The circuit court determined that the district court's opinion, which was issued approximately four months after the union members filed their original motion to intervene, bore out the union member's claim in that case. The second major event was the resolution of the *Trbovich v. UMWA*, 404 U.S. 528 (1972), *enforced sub nom. Hodgson v. UMWA*, 344 F.Supp. 17 (D.C. 1972). *Hodgson*, 473 F.2d at 126. Prior to the Supreme Court's decision in *Trbovich* (issued on January 17, 1972), the union members at issue did not have a right to intervene. *Trbovich*, 404 U.S. at 529-30. However, the Supreme Court's decision in *Trbovich* opened the door to intervention. *Id.*

Hodgson is vastly different from the present case. In *Hodgson*, the union members moved to intervene *prior* to the court's ultimate decision on the merits. *Hodgson*, 473 F.2d at 122. In the case at bar, Petitioner did not move to intervene in this case until *over one year after* the Sixth Circuit held that the Ordinance was unconstitutional, and *over eleven months after* the district court entered its judgment that the Ordinance is unconstitutional. In *Hodgson*, the union members' intervention rights were affected by a subsequent Supreme Court decision and the subsequent entry of a district court opinion in an interrelated case, both of which were issued in close proximity to the time the district court denied the union members' motion to intervene. *Trbovich v. UMWA*, 404 U.S. 528 (1972), *enforced sub nom. Hodgson v. UMWA*, 344 F.Supp.

17 (D.C. 1972). Nothing like this happened in the case at bar. Moreover, *Hodgson* turned largely on a construction of the Labor-Management Reporting Act and it imposed a bar to intervention by union members in a suit initiated by the Secretary. *Trbovich*, 404 U.S. at 531. That Act is not involved in the case at bar. There are no statutory construction issues in the case at bar. There is no conflict between the case at bar and *Hodgson*.

The other District of Columbia decision, *Smoke v. Norton*, 252 F.3d 468 (D.C. Cir. 2001), is likewise distinguishable from the case at bar. Appellants in that case were originally represented in the district court by the United States. *Id* at 469. The district court granted summary judgment against the United States, which the United States decided not to appeal. *Id.* at 469-70. In order to preserve the right to appeal the district court's dismissal, the appellants moved to intervene. *Id.* at 470. The circuit court determined that intervention was proper in that case in order to prosecute an appeal. *Id.* at 471. However, in this case, there is no want for prosecution of an appeal – Respondent is vigorously appealing the district court's order. Moreover, a review of the district court's docket sheet in *Smoke* indicates that, unlike the case at bar, that case had not been pending for over six years, with two appeals to the circuit court concluded and a third one pending. *Ranson v. Babbitt*, No. 98-CV-1422 (D.C. filed June 5, 1998), *rev'd sub nom. Smoke v. Norton*, 252 F.3d 468 (D.C. Cir. 2001). There is no conflict between the case at bar and *Smoke v. Norton*.

Finally, Petitioner's assertion that the Sixth Circuit's intervention ruling in this case conflicts with *Januszieiwicz v. Sun Ship Building & Dry Dock Co.*, 677 F.2d 286 (3rd Cir. 1982), is also erroneous. The *Januszieiwicz* case involved an

employee's claim for disability compensation, wherein the intervenor, Aetna Insurance Company ("Aetna"), had paid the employee disability benefits under the employer's group health plan. *Id.* at 289. On remand to the Administrative Law Judge ("ALJ"), Aetna moved to intervene, seeking a conditional right to reimbursement of the benefits it paid to the employee. *Id.* at 289. The ALJ denied the motion to intervene, *inter alia*, because it was untimely. *Id.* at 292-93. However, the Third Circuit reversed, finding that intervention was not untimely because Aetna sought to intervene solely to protect its right to reimbursement for amounts already paid to the employee. *Id.* at 289, 293. Unlike Aetna, the Petitioner in the case at bar has not established that it has a vested interest in the case. Also, unlike this case, Aetna's intervention in *Janusziewicz* did not impose a burden on the action, and the existing parties did not object to its intervention. Here, Petitioner's intervention would significantly burden this case, because the Sixth Circuit may have to resolve additional issues, which would require extensive briefing, prior to ruling on the merits of the underlying case. For example, allowing Petitioner to intervene now would force a new round of briefing on the merits of the underlying appeal, thereby delaying a case that the Sixth Circuit has ordered to be heard on an expedited basis that was fully-briefed and ready for oral argument on July 16, 2003. Resp't App. 1-3. Also, here, the Respondent and other parties in the case have objected to Petitioner's intervention. Resp't App. 45-49. There is no conflict between the case at bar and *Janusziewicz*.

There is no conflict between the Sixth Circuit's ruling on intervention in the case at bar and either this Court's ruling in *NAACP* or the rulings of any of the circuit court

cases cited above. In fact, there is nothing in the opinions cited that hints that this Court or any of the others would have come to a different conclusion on the facts of the case at bar.

II. The standard of review in this case is abuse of discretion; and the Sixth Circuit did not abuse its discretion in denying the motion to intervene.

A. This Court should review the Sixth Circuit's Order for abuse of discretion.

Denial of intervention under Federal Rule of Civil Procedure 24(a) is generally reviewed *de novo*. *United States v. Tennessee*, 260 F.3d 587, 592 (6th Cir. 2001). The issue of whether the motion for intervention was timely filed is, however, reviewed for abuse of discretion. *Id.* Petitioner asserts that because this case involves the First Amendment, even the timeliness issue should be reviewed *de novo*.

While the case styled *Lac Vieux Desert Band v. Detroit*, No. 02-1893 (6th Cir. filed July 15, 2002), involves remediation of Respondent Lac Vieux's First Amendment rights, Petitioner's Motion to Intervene does not. The issue before the Sixth Circuit on Petitioner's Motion to Intervene was whether it satisfied the intervention factors, not whether Petitioner's First Amendment rights have been violated. There has been no determination that Petitioner has standing to assert its professed First Amendment claim, nor has determination of that issue ever been properly before any court. And, in any event, Petitioner signed a waiver that has been held to effectively waive its rights to bring a constitutional challenge to the Ordinance

procedures at issue in this case. Before the Sixth Circuit is allowed to determine the merit of the substance of Petitioner's underlying claims, Petitioner must satisfy the procedural requirements to properly present those claims to the court. Therefore, because Petitioner's claims were never properly before the Sixth Circuit, that court did not have jurisdiction to rule on those claims and none of Petitioner's First Amendment rights are involved in the filing of a motion to intervene or the denial of that motion. For this reason, the standard of review applicable in this case is abuse of discretion.

B. The Sixth Circuit did not abuse its discretion in denying Petitioner's Motion to Intervene.

The Sixth Circuit denied Petitioner's Motion to Intervene on the basis that it was untimely. It is within the courts' discretion to deny intervention on this basis, standing alone. *NAACP v. New York*, 413 U.S. 345, 365-66 (1973). In ruling on whether a motion to intervene is timely, the Supreme Court has stated that the point to which the suit has progressed does not solely determine whether intervention is untimely, rather it is one factor to be considered. *Id.* at 366.

In *Michigan Ass'n for Retarded Citizens v. Smith*, 657 F.2d 102, 105 (6th Cir. 1981), the Sixth Circuit reiterated that intervention must be denied if untimely, and that one factor determinative of timeliness is the point to which the suit progressed. *Id.* In regard to the other timeliness factors, the court also stated that:

> Among the other circumstances to be considered are these: (1) the purpose for which intervention

> is sought; . . . (2) the length of time preceding the application for intervention during which the proposed intervenor knew or reasonably should have known of his interest in the case . . . (3) the prejudice to the original parties due to the proposed intervenor's failure after he knew of or reasonably should have known of his interest in the case promptly to apply for intervention . . . (4) the existence of unusual circumstances militating against or in favor of intervention. . . .

Id. While the Sixth Circuit has continually noted that the above factors are probative, there is no indication that *all* these factors must be established, or that *all* factors are applicable in every timeliness determination.

In this case, contrary to Petitioner's assertion, the court did not "simply state[ ] that . . . the Motion of Detroit, L.L.C. must be denied as untimely." Pet't Pet. 9. The Sixth Circuit correctly noted that the above five factors are pertinent to a timeliness determination under Fed. R. Civ. P. 24, and further discussed the factors applicable in this case. First, the court addressed the point to which this suit has progressed, stating that "[t]his litigation has been pending for more than six years, with two prior appeals to this court." Pet. App. 3a. Next, the court spoke to the circumstances militating against intervention stating, "[t]he district court has now entered a final judgment, which is the subject of this third appeal." *Id.* Finally, the Sixth Circuit considered the length of time preceding the application during which Petitioner should have known of its interest, and Petitioner's argument that it had standing as of January 2002 and was aware of its interests as of that date. *Id.*

Accordingly, the Sixth Circuit did not abuse its discretion by denying Petitioner's Motion to Intervene because it did not merely consider the point to which the suit has progressed.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Nos. 02-1893/1996

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, a federally recognized Indian Tribe, Plaintiff-Appellant/ Cross-Appellee, v. THE CITY OF DETROIT, MICHIGAN; KWAME KILPATRICK; MARY ANN MAHAFFEY; KENNETH V. COCKREL, JR.; SHEILA COCKREL; BRENDA M. SCOTT; SHARON MCPHAIL; ALBERTA TINSLEY-TALABI; ALONZO W. BATES; BARBARA ROSE COLLINS; KAY EVERETT, Defendants-Appellees, ATWATER ENTERTAINMENT ASSOCIATES, L.L.C.; GREEK-TOWN CASINO, L.L.C.; DETROIT ENTERTAINMENT, L.L.C., Intervenors-Appellees, MGM GRAND DETROIT, L.L.C., Intervenor-Appellee/ Cross-Appellant,	ORDER (Filed Sep. 12, 2002)

MICHIGAN GAMING CONTROL BOARD,

Amicus Curiae.

Before: KRUPANSKY and CLAY, Circuit Judges; GWIN, District Judge.*

The plaintiff appeals the denial of its motion for additional relief in this declaratory judgment action in which the district court found that a Detroit ordinance governing the selection of three casino developers was unconstitutional. Intervenor MGM Grand Detroit, L.L.C. ("MGM") cross appeals the denial of its motion for summary judgment as moot. The plaintiff now seeks an injunction pending appeal and moves to expedite its appeal. Although neither the defendants nor the intervenors oppose the motion to expedite, they vigorously oppose the issuance of the requested injunction pending appeal. In addition, MGM moves to strike the plaintiff's motion for an injunction for failure to comply with the page limitation and the one document requirement, and Intervenors Atwater Entertainment, L.L.C., Detroit Entertainment, L.L.C., and Greektown Casino, L.L.C. move to file a consolidated response and to exceed the page limitation. The plaintiff opposes the motion to strike and moves to file its oversized brief instanter.

We consider the traditional standards for granting injunctive relief in ruling on a motion for an injunction pending appeal and balance the following: 1) whether the plaintiff has demonstrated a likelihood of success on the

* The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

merits; (2) whether it will be irreparably injured in the absence of a stay; 3) whether a stay will substantially injure other interested persons; and 4) where the public interest lies. *Nader v. Blackwell*, 230 F.3d 833, 834 (6th Cir. 2000) (order); *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). The plaintiff was successful on the merits of its challenge to the city ordinance and has demonstrated a likelihood of success on the merits of its appeal and irreparable harm. Moreover, the defendants, the intervenors, and other interested parties are not likely to suffer substantial harm if development of the permanent casinos is delayed while this court considers the appeal.

Having considered all of the material filed by the parties, we **DENY** MGM's motion to strike, **GRANT** the intervenors' motion to file a consolidated response exceeding the page limitation, and **GRANT** the plaintiff's motion to file an oversized brief instanter. The plaintiff's motion for an injunction pending appeal is **GRANTED** insofar as the City of Detroit is temporarily enjoined from issuing any building permits for the permanent casino facilities and the Intervenor developers are enjoined from commencing construction of the permanent casino facilities. The motion to expedite the appeal is **GRANTED**, and the clerk is directed to schedule these appeals for oral argument as soon as practical after the completion of briefing.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Clerk

2002 WL 27290
___ F.3d ___

Only the Westlaw citation is currently available.

United States Court of Appeals,
Sixth Circuit.

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, Plaintiff-Appellant,

v.

The MICHIGAN GAMING CONTROL BOARD; The City of Detroit; Atwater Entertainment Associates, L.L.C.; Greektown Casino, L.L.C., Defendants-Appellees.

No. 00-1879.

Argued April 24, 2001.
Decided and Filed Jan. 11, 2002.

G. Michael Fenner (argued), Creighton University School of Law, Conly J. Schulte (briefed), Monteau & Peebles, Omaha, NE, for Appellant.

Morley Witus (argued and briefed), Barris, Sott, Denn & Driker, Detroit, MI, Bruce R. Greene (briefed), Boulder, CO, John D. Pirich (briefed), John S. Kane (briefed), Honigman, Miller, Schwartz & Cohn, Lansing, MI, for Appellees.

Before: MARTIN, Chief Judge; MOORE, Circuit Judge; O'MALLEY, District Judge.*

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* The Honorable Kathleen M. O'Malley, United States District Judge for the Northern District of Ohio, sitting by designation.

MARTIN, C.J., delivered the opinion of the court, in which MOORE, J., joined. O'MALLEY, D.J. (pp. ___-___), delivered a separate dissenting opinion.

OPINION

BOYCE F. MARTIN, JR., Chief Judge.

Upon the legalization of gambling in Detroit, the City enacted an ordinance establishing how it would issue three licenses for the operation of its new casinos. Everyone interested in this opportunity should have been allowed to compete for it on the same terms. The ordinance instead incorporated an advantage for two companies that had been active in the movement to legalize the gambling in the first place. Because Detroit based the advantage on that activity, and thereby penalized potential applicants who did not engage in it themselves, we hold that the ordinance in its current form is unconstitutional.

I.

Defendants Atwater Entertainment Associates and Greektown Casino organized petition drives to lift Michigan's ban on off-reservation gambling. First, they helped place two initiatives on the Detroit city ballot that, in tandem, would authorize casinos within the city limits so long as voters statewide approved as well. When the Detroit initiatives passed, Atwater and Greektown proceeded to organize the necessary statewide referendum, widely known as "Proposal E." Proposal E also passed. As a result, casino gambling in Detroit became legal.

Next, the Michigan state legislature passed the Michigan Gaming Control and Revenue Act, permitting the mayor of Detroit to choose three casino licensees. The city's related ordinance, the subject of this case, governed the mayor's selections. In numerous respects, the ordinance rewards Atwater and Greektown for their efforts during the state and local referenda campaigns. For example, the ordinance includes a "statement of intent" declaring that "it is in the best interest of the City to provide a preference to those developers who took the initiative to facilitate the development of casino gaming in the City of Detroit by proposing a casino gaming proposal approved by the voters of the City, and who actively promoted and significantly supported the State initiative authorizing gaming." Detroit City Code, § 18-13-1(i). Another portion expressly prefers casino developers who, assuming they meet the other eligibility criteria, were "initiator[s] of a casino gaming proposal which was approved by the voters of this City prior to January 1, 1995; and . . . made significant contributions to the development of gaming within the City by actively promoting and significantly supporting a state initiative authorizing gaming." Detroit City Code, § 18-13-6(a)(2). Unsurprisingly, the mayor ultimately awarded Atwater and Greektown two of the three licenses, and both companies currently operate casinos in Detroit.

II.

An Indian tribe that offers gambling on its Michigan reservation, the Lac Vieux Desert Band of Lake Superior Chippewa Indians, sued because of the obvious handicap it and all other prospective off-reservation operators faced in the Detroit licensing process. Essentially, the Lac Vieux

claims that the ordinance's preference provisions discriminate against it for having not taken Atwater and Greektown's particular political position in the casino legalization debate. According to the Lac Vieux, the ordinance's licensing procedure thus violates the guarantees of the First Amendment as well as of the Fourteenth Amendment's Equal Protection Clause.

In granting Detroit summary judgment on October 31, 1997, the district court held that the Lac Vieux lacked standing to bring its claims and that, even if the Lac Vieux did have standing, the claims lacked merit. The Lac Vieux appealed. We reversed the district court on all these issues, holding in particular that the district court's exceptionally deferential review of the ordinance, considering only whether Detroit conceivably could have had any rational reason to enact it as it had, was inappropriate. *See Lac Vieux Desert Band v. Michigan Gaming Control Board,* 172 F.3d 397, 409 (6th Cir.1999) (*Lac Vieux I*). On remand, the district court purported to demand more of the ordinance but again sustained it. This second appeal followed. Our review of the district court's decision is *de novo. See United States v. Hill,* 167 F.3d 1055, 1063 (6th Cir.1999).

III.

The doctrine of the law of the case requires us to honor the prior rulings of this Court in this litigation. Although we acknowledge that there are limited exceptions to this general principle, we are satisfied that none of them apply now. *See United States v. Todd,* 920 F.2d 399, 403 (6th Cir.1990); *Coal Resources, Inc. v. Gulf & Western Indus., Inc.,* 865 F.2d 761, 767 (6th Cir.1989) (per curiam).

The law of the case here is *Lac Vieux I,* and it establishes three propositions for our purposes: that the Lac Vieux has standing, that the preference provisions restrict First Amendment rights, and that, because the law permits that restriction only on the rarest of occasions, the ordinance is subject to the test commonly known as "strict scrutiny."[1] *See Lac Vieux I,* 172 F.3d at 407, 409-10. All *Lac Vieux I* leaves for us is the test's administration. We start by presuming that the ordinance is unconstitutional. Detroit can overcome that presumption only by proving that the ordinance is necessary to serve a compelling state interest and narrowly drawn to achieve that interest. *See id.* at 409 (citing *R.A.V. v. City of St. Paul,* 505 U.S. 377, 382-83, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992)). In our view, the City is unable to meet this heavy burden. With the preference, the ordinance is fatally unfair, and the casino licenses Detroit has issued to date are illegitimate.

Applying the analytic framework that *Lac Vieux I* sets forth, we first ask whether Detroit can demonstrate that the ordinance serves a *compelling* governmental interest. It can. We accept that the preference promotes the stability of Detroit's political and tax systems, and these interests are indeed compelling under the First Amendment. *See Hernandez v. Commissioner,* 490 U.S. 680, 699, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989); *Gable v. Patton,* 142

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[1] Under *Lac Vieux I,* the ordinance also implicates the Equal Protection Clause by employing a classification that affects "a constitutionally protected fundamental right, the right to freedom of speech," *Lac Vieux I,* 172 F.3d at 410, but both the district court and the parties now treat this portion of the decision as merely an alternative basis for the application of strict scrutiny, *see id.* (citing *Clark v. Jeter,* 486 U.S. 456, 461, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988)). We will do the same.

F.3d 940, 947 (6th Cir.1998) (quoting *Storer v. Brown,* 415 U.S. 724, 736, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974)); *see also Minneapolis Star v. Commissioner,* 460 U.S. 575, 586, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983) (deeming government interest in raising revenue "critical" while deciding case on other grounds).

Given that the ordinance serves these "compelling" interests in some measure, we next ask if the ordinance is *necessary* in order for the interests to be served at all. Likewise, with regard to the First Amendment problem that *Lac Vieux I* has already decided exists, we look at whether the ordinance is the *least restrictive* possible way of serving those interests. Here, Detroit's arguments become unpersuasive. Were we to agree that the ordinance is theoretically *capable* of ensuring for Detroit a stable political system and a sound tax system, the proper inquiry remains whether those things cannot exist without the current ordinance on the books. Detroit stresses that the City's electorate had rejected proposals that would have legalized casino gaming on five prior occasions, and projects that it would also have rejected this one without some indication of the likelihood that the casinos would be run by, as the district court described Atwater and Greektown, "Detroit businesses who had already invested in the City [and] who had demonstrated their commitment to the revitalization of the City." However, this explanation goes to whether the preference was necessary to getting the ordinance passed, not to whether the preference is necessary to serve Detroit's compelling interests. In any event, the protections of the First Amendment cannot just be wished away, regardless of how much the government might like to do so. Furthermore, Detroit collapses the doctrinally accurate argument of whether the ordinance is

necessary to serve its compelling interests into an argument that casinos themselves are necessary to do so. But Detroit has not demonstrated that its political and economic conditions are yet quite so dire that casinos present their last chance for salvation.

Accordingly, the preference renders the ordinance invalid. Absent the provision, we are confident that Detroit's interests could be served without intruding upon the Lac Vieux's First Amendment rights. The district court apparently decided otherwise because Detroit previously had rejected a means more restrictive than the preference, giving Atwater and Greektown an outright guarantee that casino licenses would be theirs. This was erroneous. As the Lac Vieux has put it, the district court effectively turned this aspect of strict scrutiny "on its head," failing to recognize that Detroit's ordinance must do the least damage to the First Amendment, not just avoid doing the most damage. A less restrictive means of serving the interests Detroit has identified is simply leaving the preference out.

By employing the preference, Detroit basically sought to end the high-stakes competition for two of the three Detroit casino licenses before it really began. This we cannot allow. Barring governments from endorsing or punishing political activity, or the lack of it, is among the paramount functions of the First Amendment's Free Speech Clause. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) ("[E]xpression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" (quoting in part *Carey v. Brown*, 447 U.S. 455, 467, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980))); *see also Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,*

515 U.S. 557, 573, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) ("One important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" (quoting in part *Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 16, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) (plurality opinion))). In this tradition, the decision of the district court is REVERSED and REMANDED for proceedings consistent with this opinion.

O'MALLEY, District Judge, dissenting.

The majority reverses the district court based on two conclusions: (1) the Detroit ordinance is constitutional only if it survives "strict scrutiny;" and (2) the ordinance does not pass this rigorous test. I agree with the second conclusion – as the Supreme Court has noted, "it is the rare case in which . . . a law survives strict scrutiny." *Burson v. Freeman*, 504 U.S. 191, 211, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992). I do not agree, however, that the ordinance is constitutional only if it survives strict scrutiny analysis. Accordingly, I respectfully dissent.

The majority notes that, in *Lac Vieux I*,[1] a different panel concluded that the preference provisions contained in the ordinance "implicate[ ] the First Amendment." 172 F.3d at 409. I agree with the majority, op. at ___, that this is the law of the case. I do not agree with the majority, however, that it is also the law of the case that the test for constitutionality which the ordinance must survive is strict scrutiny. While the panel in *Lac Vieux I* wrote:

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[1] *Lac Vieux Desert Band v. Michigan Gaming Control Board*, 172 F.3d 397, 409 (6th Cir. 1999).

"[a]lthough the district court and the parties have provided little guidance on the question, *principally because the district court did not reach this issue,* we conclude that the ordinance is content-based and is therefore subject to strict scrutiny," *id.* at 409-10 (emphasis added), that conclusion was gratis dictum. *See Black's Law Dictionary* (7th ed. 1999) (defining gratis dictum as "a court's discussion of points or questions not raised by the record"). In fact, the ruling in *Lac Vieux I* was simply and only that the Lac Vieux tribe had standing to challenge the Detroit ordinance and that such a challenge did "implicate the First Amendment." The statement that, on remand, the district court should apply a strict scrutiny analysis to the Detroit ordinance was not necessary to the panel's ruling.

Of course, the district court would have been unwise to ignore the suggestions made in *Lac Vieux I* on how to proceed. I disagree, however, that this Court is constrained by the law of the case doctrine to follow that same suggestion. As the *Lac Vieux I* panel expressly stated, at that juncture, neither the parties nor the district court had addressed the critical issue of the appropriate level of constitutional review. As noted, the district court below and the parties on appeal in *Lac Vieux I* focused on whether the plaintiff had standing to assert its claims *at all* and whether, if so, those claims were even cognizable under the First Amendment – legal questions that were hotly disputed. To the extent the *Lac Vieux I* panel expressed an opinion on anything beyond those threshold questions, accordingly, it did so without the benefit of briefing, argument, or a lower court decision on the issue. In contrast, the briefing before this panel contains substantial argument regarding the proper constitutional standard to be applied in the circumstances presented

here. I do not believe we should relegate the analysis of this critical question to a one-sentence reference in a prior opinion, out of an unnecessary desire to adhere to the law of case doctrine. Indeed, I do not believe the *Lac Vieux I* panel would feel bound by its own dicta, or expect this panel to be bound by it.

Furthermore, even if *Lac Vieux I* did establish the law of this case to be that the Detroit ordinance must be narrowly drawn to serve a compelling state interest, I still believe we should not be bound by this pronouncement. "A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618, n. 8, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983)). I am afraid that, in fact, the pronouncement in *Lac Vieux I* that the ordinance must survive strict scrutiny is clearly erroneous, and that application of this test would work a manifest injustice.

In *Board of County Comm'rs, Wabaunsee Cty., Kansas v. Umbehr*, 518 U.S. 668, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996), the Supreme Court considered the question of "whether, and to what extent, the First Amendment restricts the freedom of federal, state or local governments to terminate their relationships with independent contractors because of the contractors' speech." *Id.* at 673-74, 116 S.Ct. 2342. Resolving "a conflict between the Courts of Appeals," the Supreme Court held that: (1) the First Amendment does protect independent contractors from

termination of government contracts in retaliation for exercising free speech rights; and (2) "the *Pickering* balancing test, adjusted to weigh the government's interests as contractor rather than as employer, determines the extent of their protection." *Id.* at 673, 116 S.Ct. 2342 (citing *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty., Illinois,* 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968)); *see O'Hare Truck Service, Inc. v. City of Northlake,* 518 U.S. 712, 719, 116 S.Ct. 2353, 135 L.Ed.2d 874 (1996).

The *Pickering* balancing test, in turn, calls for weighing the plaintiff's "right to speak on a matter of public concern against 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Hardy v. Jefferson Community College,* 260 F.3d 671, 679-80 (6th Cir.2001) (quoting *Pickering,* 391 U.S. at 568, 88 S.Ct. 1731). And, when measuring the balance, a district court should "deferentially view" the state's "legitimate interests as contractor." *Umbehr,* 518 U.S. at 685, 116 S.Ct. 2342. The likelihood that the Detroit ordinance could pass constitutional muster under this test, of course, is far higher than under the strict scrutiny test.

Indeed, even this *Umbehr/Pickering* balancing test may be too stringent. The Supreme Court in *Umbehr* was careful to note the "limited nature" of its decision, stating that, because the plaintiff's lawsuit "concern[ed] the termination of a *pre-existing commercial relationship* with the government, [the Court did] not address the possibility of suits by bidders or applicants for new government contracts who cannot rely on such a relationship." *Id.* at 685, 116 S.Ct. 2342 (emphasis added). When, as here, there is *not* a pre-existing commercial relationship

between the state and the bidder or applicant for a government contract, the balance falls even more in favor of the state. *See McClintock v. Eichelberger,* 169 F.3d 812, 815-17 (3rd Cir.1999), *cert. denied,* 528 U.S. 876, 120 S.Ct. 182, 145 L.Ed.2d 154 (1999) (noting, in circumstances similar to those presented in this case, that the balancing test called for by *Umbehr* and *O'Hare* was too strict, because the plaintiff did not have a pre-existing, ongoing contractual relationship with the state). In fact, at least one district court has applied *McClintock* and concluded that, when there is "no such ongoing commercial relationship, there is no First Amendment protection and thus in the absence of such a relationship, a cause of action is not recognized for failure to award a contract in retaliation for exercise of one's First Amendment rights." *Halstead v. Motorcycle Safety Foundation Inc.,* 71 F.Supp.2d 464, 473-74 (E.D.Pa.1999).

Laudably, the panel in *Lac Vieux I* tried to give the district court some guidance on how to measure the constitutionality of the Detroit ordinance. As the panel admitted, however, "the district court and the parties have provided [us with] little guidance on the question" of the correct standard of constitutional review. *Lac Vieux I,* 172 F.3d at 409. Indeed, in the absence of this guidance, the *Lac Vieux I* panel looked to cases involving criminal ordinances restricting speech, rather than to *Umbehr* or *O'Hare,* when it suggested the appropriate level of review. *Id.* at 409-10 (citing *R.A.V. v. City of St. Paul, Minn.,* 505 U.S. 377, 382-383, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), in which a criminal defendant challenged an ordinance prohibiting bias-motivated disorderly conduct, and *Frisby v. Schultz,* 487 U.S. 474, 481, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988), in which abortion protestors challenged an

ordinance prohibiting picketing near an individual dwelling).

On remand, the district court struggled to reconcile the panel's reference to strict scrutiny with the Supreme Court's recognition in *Umbehr* and *O'Hare* of the circumscribed nature of the right at issue in these circumstances. The district court did so by finding that the right rested at the fringes of any strict scrutiny concern and that the level of review should be more deferential to the state than normally required when strict scrutiny applies. While as the majority concludes, that approach may be inappropriate, it is understandable given the obvious tension between the strict scrutiny reference in *Lac Vieux I* and the Supreme Court's contrary holdings in *Umbehr* and *O'Hare*.

While the majority is correct that strict scrutiny is not flexible enough to support the district court's conclusion on remand, I believe that, by accepting strict scrutiny as the standard to be applied in this case, the majority is committing error and forcing a manifest injustice on the parties. Even worse, I am not at all clear precisely what that injustice might be; the majority opinion does not explain what the district court should actually do, now, on remand. Should it "determine whether the offending provisions are severable from the remainder of the ordinance?" *Lac Vieux I,* 172 F.3d at 410. Revoke the appellees' licenses? Require the existing multi-million dollar casinos be razed? Hold a trial to measure damages? Hold a trial to determine if the appellant would have secured a license?[2]

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[2] The *Lac Vieux I* panel concluded that the appellant had carried its *"burden on summary judgment"* of showing it was "ready and able to

(Continued on following page)

With all due respect to the panel in *Lac Vieux I,* and to my co-jurists in the majority who feel bound by *Lac Vieux I,* I believe the standard of constitutional review employed in this case is incorrect. To adopt it puts us at odds with binding Supreme Court precedent and our sister Circuit Courts of Appeals. *See, e.g., McClintock,* 169 F.3d at 815-17; *Shahar v. Bowers,* 114 F.3d 1097, 1102-03 (11th Cir.1997) (en banc), *cert denied,* 522 U.S. 1049, 118 S.Ct. 693, 139 L.Ed.2d 638 (1998) ("the [*Umbehr*] Court held that government contractors are protected from termination or failure to renew their contracts for exercising their free speech rights and that the *Pickering* balancing test is the appropriate standard for determining whether a First Amendment violation has occurred"). Indeed, it puts us at odds with prior opinions of this very Court. *See, e.g., Thaddeus-X v. Blatter,* 175 F.3d 378, 392 (6th Cir.1999) (noting that the *Pickering/Umbehr* test has been "applied in a variety of First Amendment settings," including even "the prison context").

Accordingly, I dissent, and suggest that this issue might be suitable for further review.

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submit a proposal and that it was willing and able to pay the associated fees." 172 F.3d at 406 (emphasis added). In other words, there existed material questions of fact regarding whether the tribe was ready, willing, and able timely to do what was required to obtain a license. Appellees argue – correctly, it appears to me – that they could still prevail on all pending claims *at trial* if they prove that, in fact, the appellant was *not* ready, willing, and able to meet these requirements.

172 F.3d 397
1999 Fed. App. 0132P

United States Court of Appeals,
Sixth Circuit.

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, Plaintiff-Appellant,

v.

The MICHIGAN GAMING CONTROL BOARD, et al., Defendants-Appellees, Atwater Entertainment Associates, L.L.C.; Greektown Casino, L.L.C.; State of Michigan; Frank J. Kelley, Attorney General ex rel the People of the State of Michigan, Intervenors-Appellees.

No. 97-2249.

Argued Dec. 9, 1998.
Decided April 12, 1999.

John M. Peebles (briefed), *Conly J. Schulte* (briefed), Monteau, Peebles & Evans, Omaha, Nebraska, *G. Michael Fenner* (argued and briefed), Creighton University School Of Law, Omaha, Nebraska, for Plaintiff-Appellant.

John M. Cahill (argued and briefed), Assistant Attorney General, Casino Control Division, Lansing, Michigan, for Defendants-Appellees Michigan Gaming Control Board, Thomas Denomme, Michael Stacey, Paula Blanchard.

Morley Witus (briefed), Barris, Sott, Denn & Driker, Detroit, Michigan, for Defendant-Appellee City of Detroit.

John D. Pirich (argued and briefed), *John S. Kane*, Honigman, Miller, Schwartz & Cohn, Lansing, Michigan, for Intervenor-Appellee Atwater Entertainment Associates, L.L.C.

Bruce R. Greene (briefed), Greene, Meyer & McElroy, Boulder, Colorado, for Intervenor-Appellee Greektown Casino, L.L.C.

Thomas R. Wheeker (briefed), Office of the Attorney General, Tort Defense Division, Lansing, Michigan, for Intervenor-Appellee Frank J. Kelley.

Before: *NELSON*, *SILER*, and *DAUGHTREY*, Circuit Judges.

DAUGHTREY, Circuit Judge.

The Lac Vieux Desert Band of Lake Superior Chippewa Indians brought this action, challenging a Michigan state statute and a Detroit city ordinance that govern the development and regulation of casino gambling in Detroit. The plaintiff asserts that both the statute and the ordinance award an unconstitutional preference in the development of casino gambling to two particular parties, Atwater Entertainment and Greektown Casino (intervenors in this case). On appeal, Lac Vieux contests the district court's grant of summary judgment to the defendants on three grounds, contending (1) that the district court erred in determining that Lac Vieux lacked standing to bring its First Amendment and equal protection claims; (2) that the district court erred in determining that the First Amendment is not implicated in this case; and (3) that the district court erred in applying rational basis review in determining the merits of the equal protection claim. We conclude that the district court did err in determining that Lac Vieux lacks standing to challenge the Detroit ordinance, in determining that the First Amendment is not implicated in that legislation, and in applying rational basis review in determining the merits of the equal protection claim. The district court was correct,

however, in holding that the plaintiff lacks standing to challenge the state statute. We therefore affirm the judgment of the district court in part, reverse it in part, and remand the case to the district court for further proceedings.

PROCEDURAL AND FACTUAL BACKGROUND

The Lac Vieux Desert Band of Lake Superior Chippewa Indians is a federally recognized Indian tribe that operates a casino on its reservation in Gogebic County, Michigan. In 1994, Lac Vieux, in conjunction with several partners, developed a plan to establish a casino in downtown Detroit. At that time, however, off-reservation gambling was not legal in the state of Michigan, and the governor of Michigan declined to approve the project.

Atwater Entertainment and Greektown Casino also proposed to bring gambling to Detroit. In 1994, they secured sufficient signatures to place on the city ballot two ordinance initiatives that, in conjunction, would repeal the prohibition against casino gambling within the city and authorize Atwater Entertainment and Greektown Casino to conduct casino gambling there. They each spent substantial sums of money to promote passage of the initiatives. Detroit voters approved the initiatives in August 1994, but development of casino gambling was still prevented by Michigan state law.

Atwater Entertainment and Greektown Casino subsequently sponsored a state ballot proposal, Proposal E, which provided for an initiated law, the Michigan Gaming Control and Revenue Act, designed to change state law to allow casino gaming in Detroit. Again, they each devoted substantial sums of money to advertise and

promote the adoption of Proposal E, which was adopted by the Michigan electorate on November 5, 1996, and was codified as Mich. Comp. Laws §§ 432.201, *et seq.*

The initiated act authorized the development and operation of casino projects in Michigan cities where:

> (1) the city has a population of at least 800,000 at the time a license is issued;
>
> (2) the city is located within 100 miles of any other state or country in which gaming is permitted; and
>
> (3) a majority of the voters of the local unit of government have expressed approval of casino gaming in the city.

Mich. Comp. Laws § 432.202(f). Detroit is the only city that met these criteria. The initiated act also created the defendant Michigan Gaming Control Board and granted this body exclusive authority to authorize state licenses to operate casinos. *See* Mich. Comp. Laws §§ 432.204(a), 432.205-432.208.

Section 432.206(a)(1) of the initiated act provided an exemption from the competitive bidding process at the city level for any license applicant who "was the initiator of any casino gaming proposal submitted for voter approval in the city in which the casino will be located and the voters approved the proposal." Mich. Comp. Laws § 432.206(a)(1). Section 432.206(a)(3) provided that an applicant must have entered into a development agreement with the city in order to be eligible for a casino license. *See* Mich. Comp. Laws § 432.206(a)(3). Section 432.206(b) limited the number of licenses that the Board

could grant and provided for further preferential treatment in the licensing process:

> No more than three (3) licenses shall be issued by the board in any city. In the event that more than three (3) applicants meet the criteria provided for in Section 6(a) of this Act, licenses shall first be issued to applicants which submitted any casino gaming proposal for voter approval prior to January 1, 1995, in the city in which the casino will be located and the voters approved the proposal.

Mich. Comp. Laws § 432.206(b). Atwater Entertainment and Greektown Casino were the only entities eligible for both the exemption from competitive bidding and the preference over other applicants.

Lac Vieux initiated this suit against the Board, the City of Detroit, the Mayor, and City Counsel members in February 1997, seeking to have the initiated act declared unconstitutional on the grounds that it impaired an exclusive contractual right; that it violated the takings, equal protection, and due process clauses of the federal and Michigan constitutions; that it violated the state constitution's prohibition against special legislation; and that it constituted an unlawful delegation of legislative authority to the City of Detroit. Atwater Entertainment, Greektown Casino, and the Michigan Attorney General successfully sought to intervene in the case in May 1997.

In the meantime, in order to implement the initiated act, the Detroit City Council adopted an ordinance entitled the Casino Development Competitive Selection Process, which is now codified as Detroit City Code §§ 18-13-1 *et seq.* This June 1997 ordinance authorizes the Mayor to select three developers to enter into casino development

agreements with the city, and it sets forth the criteria by which these developers must be chosen. *See* Detroit City Code, §§ 18-13-3; 18-13-5. The City Council must review and approve proposed development agreements. *See* Detroit City Code, § 18-13-8.

The ordinance's Statement of Intent indicates that "[i]n selecting developers of casinos, it is in the best interest of the City to provide a preference to those developers who took the initiative to facilitate the development of casino gaming in the City of Detroit by proposing a casino gaming proposal approved by the voters of the City (City Ordinances 15-94 and 16-94), and who actively promoted and significantly supported the State initiative authorizing gaming." Detroit City Code, § 18-13-1. This preference is laid out even more fully in Section 18-13-6, which provides in part that:

> (a) In considering proposals and in selecting a prospective developer with whom the Mayor or his designee will negotiate a development agreement, a prospective developer is entitled to a preference if:
>
> (1) its proposal meets the criteria established by this Chapter and by the request for proposals;
>
> (2) it was the initiator of a casino gaming proposal which was approved by the voters of this City prior to January 1, 1995; and
>
> (3) it made significant contributions to the development of gaming within the City by actively promoting and significantly supporting a state initiative authorizing gaming.

Detroit City Code, § 18-13-6. If a developer meets these criteria, then the developer will receive a "more favorable

position" in the competitive bidding process. Detroit City Code, § 18-13-2. Greektown Casino and Atwater Entertainment are the only developers who could qualify for this preference.

On June 23, 1997, the City of Detroit published the Phase I Request for Proposals and Qualifications pursuant to the ordinance. Detailed proposals and a $50,000 Phase I fee were to be submitted by August 1, 1997. Eleven developers, including Atwater Entertainment and Greektown Casino, submitted timely proposals. Lac Vieux declined to submit a proposal. On August 22, 1997, the Mayor invited seven developers to submit Phase II proposals along with the $250,000 Phase II fee. On November 20, 1997, subsequent to the filing of the district court's opinion, the Mayor announced that MGM Grand-Detroit, Greektown Casino, and Detroit Entertainment (Atwater Entertainment/ Circus Circus) had been selected.

In the meantime, while the developer selection process was being conducted by the City of Detroit, the state legislature voted to amend Proposal E. The governor signed the amendments into law on July 17, 1997. The amended act restates the criteria that an applicant must meet in order to be eligible to apply for a casino license. As under the initiated act, these criteria include the requirement that an applicant must have "entered into a certified development agreement with the city where the local legislative body enacted an ordinance approving casino gambling." Mich. Comp. Laws § 432.206(1)(b). However, under the Amended act:

> A city shall not certify or submit and have pending before the board more than 3 certified development agreements. If an applicant is denied a casino license by the board, the city may then

> certify a development agreement with another applicant and submit the certified development agreement to the board. Nothing in this act shall be construed to prevent the city from entering into more than 3 development agreements.

Mich. Comp. Laws § 432.206(2). Furthermore, the amended act provides:

> No more than three (3) licenses shall be issued by the board in any city. . . . In evaluating the eligibility and suitability of all applicants under the standards provided in this act, the board shall establish and apply the standards to all applicants in a consistent and uniform manner. In the event that more than three (3) applicants meet the standards for eligibility and suitability provided for in subsections (4) and (5), licenses shall first be issued to those eligible and suitable applicants which submitted any casino gaming proposal for voter approval prior to January 1, 1995, in the city in which the casino will be located and the voters approved the proposal.

Mich. Comp. Laws § 432.206(3).

Thereafter, Lac Vieux twice amended its complaint. The first amendment addressed the amended act and the ordinance, both of which had been passed subsequent to the filing of the original complaint. In the second amended complaint, Lac Vieux withdrew its due process challenge to the amended act, as well as the claim that the amended act constituted unlawful delegation of legislative authority. However, the amended complaint set out new First Amendment claims: it alleged that both the amended act and the ordinance violate the free speech and freedom of association clause of the First Amendment to the federal constitution, by awarding preferences to parties "for their

political support of a particular side of a controversial political issue." Following the filing of the second amended complaint, the issues before the district court were, as summarized by that court:

> (1) that the Amended act impairs the exclusive contractual right of [Lac Vieux] to operate Class III games of chance in Michigan; (2) that the Amended act destroyed the exclusive right and constitutes a taking in violation of the United States and Michigan Constitutions; (3) that the preferential treatment given to Atwater Entertainment and Greektown in the Amended act constitutes a denial of [Lac Vieux's] right to the equal protection of the laws of the state of Michigan; (4) that the preferences in the Amended act violate the prohibition against special legislation found in Article IV § 29 of the Michigan Constitution; (5) that the preferential treatment given to Atwater Entertainment and Greektown in the Ordinance violates [Lac Vieux's] right to equal protection of the laws of the state of Michigan; (6) that the Ordinance deprives [Lac Vieux] of property without due process of law; (7) that the preference in the Ordinance violates the prohibition against special legislation found in Article § 29 of the Michigan Constitution; (8) that the preferences found in the Amended act violate the free speech and political association clause of the First Amendment; [and] (9) that the Ordinance violates the free speech and political association clause of the First Amendment.

Subsequently, the district court denied Lac Vieux's motion for summary judgment and granted the motions for summary judgment submitted by the defendants and the intervenors. The district court held that Lac Vieux did

not have an exclusive right to operate that would support its contracts, takings, and due process claims, and that it lacked standing to bring its remaining claims, including the First Amendment and equal protection claims. Despite its finding that Lac Vieux lacked standing to bring these claims, the district court found that the First Amendment is not implicated in this case, that the equal protection claims did not survive rational basis review, and that the special legislation claims were meritless. The only issues now raised on appeal are the standing decision and the First Amendment and equal protection claims.

DISCUSSION

I. Standing

Lac Vieux alleges that the district court erred in finding that it lacked standing to assert both its First Amendment and equal protection claims. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin,* 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Constitutional limitations on standing require that there must be an actual case or controversy. *See Pestrak v. Ohio Elections Comm'n,* 926 F.2d 573, 576 (6th Cir. 1991). The Supreme Court set forth the elements necessary for there to be a "case or controversy" in *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), as follows:

> [T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact – an

> invasion of a legally-protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of. . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. at 560-61, 112 S.Ct. 2130 (internal quotation marks and citations omitted). Prudential limitations dictate that "the plaintiff must be a proper proponent, and the action a proper vehicle, to vindicate the rights asserted." *Pestrak,* 926 F.2d at 576.

A. Standing to Bring Equal Protection Claim

1. The Detroit Ordinance

The district court held that Lac Vieux does not have standing to bring its equal protection claim because it has failed to show that it suffered an injury in fact. Specifically, the court held, the plaintiff did not sufficiently allege that it was "ready and able" to submit a proposal in the City of Detroit's competitive bidding process. On appeal, Lac Vieux argues that the district court erred in determining that it was not ready and able, misapplied *Associated General Contractors of America v. City of Jacksonville,* 508 U.S. 656, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993), and ignored crucial evidence. We agree.

In *Associated General,* an association of general contractors challenged an ordinance that awarded preferential treatment to minority business enterprises. The Eleventh Circuit held that the association lacked standing because it did not allege that any of its members would

have been awarded a contract but for the challenged ordinance, leading the court to conclude that there was no injury in fact. *Id.* at 664, 113 S.Ct. 2297. The Supreme Court reversed the Court of Appeals, holding that:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of a barrier, not the ultimate inability to obtain the benefit. . . . [I]n the context of a challenge to a set-aside program, the "injury in fact" is the inability to compete on an equal footing in the bidding process, not the loss of a contract.

Id. at 666, 113 S.Ct. 2297. The Court therefore held that in order to establish standing, "a party challenging a set-aside program like Jacksonville's need only demonstrate that it is *able and ready* to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." *Id.* (emphasis added). Although this case does not involve a strict set-aside program like that in *Associated General,* the principles set forth in *Associated General* are applicable. Therefore, as the district court correctly noted, "the standing issue hinges on whether [Lac Vieux] has sufficiently alleged that it is able and ready to bid for a casino license."

Lac Vieux claims it has a demonstrated history of participating in casino development projects and was

ready and able to submit a bid. The second amended complaint states:

> 22. [Lac Vieux] has arranged for the development of major casino resort development projects in the State of Michigan, including a project in conjunction with Full House Resorts, Inc., and GTECH Corporation for the development of a casino resort project in downtown Detroit, Michigan, which included a development in excess of two million (2,000,000) square feet of the former Hudson's Department Store, at a projected cost of Two Hundred Million Dollars ($200,000,000) to Three Hundred Million Dollars ($300,000,000). In addition, [Lac Vieux] has executed the development, finance and construction of a multi-million dollar casino, hotel, fine dining, and golf resort that the Tribe currently owns and operates on its Reservation in Gogebic County, Michigan.
>
> 23. At all times relevant herein, [Lac Vieux] has been ready and has had the ability to submit the requisite information for a casino development proposal in accordance with the Request for Proposals/Qualifications issued by the City of Detroit on June 23, 1997, and Section 18-13-1 through 18-13-11 of the Detroit City Code.

However, the district court held that Lac Vieux had *not* sufficiently alleged that it is ready and able to submit a proposal to the City of Detroit. The district court relied on the fact that the earlier attempt to establish a casino in Detroit had not gone through, that Lac Vieux had partners in that earlier endeavor, that Lac Vieux's experience with its own casino did not demonstrate an ability to address the many requirements of a competitive proposal, that Lac Vieux did not submit a proposal for the court's review, that Lac Vieux had not shown how it would address proposal

requirements such as financial stability and compulsive gambling, and that Lac Vieux had not demonstrated a willingness or ability to pay the fees associated with submitting a proposal. We conclude that this analysis was faulty for several reasons.

First, the district court's analysis indicates a misunderstanding of what a plaintiff must show in order to prove that it is "ready and able" to submit a proposal as required by *Associated General.* The grounds relied upon by the district court are evidence of whether a proposal that Lac Vieux might have submitted would ultimately have been successful. They are not indicative of whether Lac Vieux had the capability simply *to submit* a proposal. Under *Associated General,* Lac Vieux "need not allege that [it] would have obtained the benefit but for the barrier in order to establish standing." *Associated General,* 508 U.S. at 666, 113 S.Ct. 2297. Lac Vieux therefore need not allege that it would have been awarded a contract but for the preferential and thereby allegedly unconstitutional selection process, but only that it was capable of submitting a proposal. Although the district court did state that it had "not required [Lac Vieux] to show that it would have been selected, rather [Lac Vieux] has only been required to show that [sic] is ready and able to submit the proposal in question," the court's analysis belies this assertion.

Second, the district court's finding that Lac Vieux's assertion that it was ready and able to submit a proposal to the City of Detroit "is merely a conclusion without any evidentiary support," is simply incorrect, as is the court's finding that Lac Vieux has not demonstrated a willingness or ability to pay the fees associated with submitting a proposal. The record includes an affidavit by Tom Kolinsky, the Executive Director for the Lac Vieux Desert

Band of Lake Superior Chippewa Indians, submitted as an exhibit to Lac Vieux's brief in support of its motion for summary judgment, in which Kolinsky testifies that based upon his knowledge of Lac Vieux's financial and other resources, and based upon his personal knowledge of the position of the Tribal Council:

> a. At all times relevant herein, the *Tribe was, and is, ready, and has the ability to submit a proposal* in accordance with the Development Ordinance and Request for Proposals/ Qualifications issued by the City of Detroit on June 23, 1997, containing all the information requested therein, including, but not limited to: the Tribe's background and experience in the operation of a casino; a plan for a design for a casino which is compatible with the City of Detroit; a plan for economic development for the City of Detroit; a plan that addresses the necessary infrastructure improvements associated with a casino development in the City of Detroit; a plan for dealing with social issues related to gambling associated with a development of a casino in Detroit, Michigan, and the Tribe's financial strength and backing.
>
> b. *The Tribe has adequate financial resources to pay the fees* required in connection with the selection process contained in the Phase I Request for Proposals/Qualifications and Phase II Request for Proposals/Qualifications, including the Fifty Thousand Dollar ($50,000) fee to be submitted by Phase I proposers in connection with submitting a Phase I proposal and a Two Hundred Thousand Dollar ($250,000) fee to be paid by Phase II proposers in connection with submitting their Phase II proposals.

> c. *But for the preferential treatment* given to Atwater Entertainment and Greektown in the Amended Act and Development Ordinance, [*Lac Vieux] would have submitted a proposal* for a casino development project in the City of Detroit.

(Emphasis added.) Given that these facts are not contradicted by any evidence presented by the defendants or the intervenors, we conclude that this affidavit is sufficient to meet the plaintiff's burden on summary judgment. The evidence shows that Lac Vieux was ready and able to submit a proposal and that it was willing and able to pay the associated fees.

Finally, the district court seemed to be under the impression that in order for Lac Vieux to meet *Associated General's* "ready and able" requirement, it must be able and ready to submit a proposal *immediately.* The district court suggested, for example, that Lac Vieux should have submitted a proposal for the district court's review. Although such a submission would certainly have established that Lac Vieux was able and ready to submit a proposal, it was not mandatory. The parties agree that it would require substantial time and expense to prepare the type of proposal foreseen by the Phase I Request for Proposals and Qualifications, no less by Phase II. The law recognizes, however, that a plaintiff need not make costly futile gestures simply to establish standing, particularly when the First Amendment is implicated. *See, e.g., Virginia v. American Booksellers Ass'n, Inc.,* 484 U.S. 383, 392-93, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988) (holding that injury in fact was established where plaintiffs would have had to take "significant and costly compliance measures or risk criminal prosecution" if their interpretation of the statute is correct); *Clements v. Fashing,* 457 U.S. 957, 962,

102 S.Ct. 2836, 73 L.Ed.2d 508 (1982) (holding that there was a case or controversy where plaintiffs "alleged in a precise manner that, but for the sanctions of the constitutional provision they seek to challenge, they would engage in the very acts that would trigger the enforcement of the provision"). It is therefore sufficient that Lac Vieux has shown that it could have submitted a timely proposal and that it was still ready to do so, should the preference be struck down and the bidding process started over.

For all these reasons, we conclude that Lac Vieux has standing to bring its equal protection claim in regard to the city ordinance.

2. The Amended Act

The district court did not address Lac Vieux's standing to bring an equal protection claim against the amended act as a separate issue from Lac Vieux's standing to bring an equal protection claim against the city ordinance. Although the same principles governing standing to challenge the ordinance would apply to an equal protection claim against the amended act, it is not necessary to go through that analysis here because the amended act appears to render the preference ineffective. If the preference is ineffective, then there can be no injury and no "case or controversy." Although Lac Vieux attempts to rebut the defendants' and the intervenors' contention that the preference is ineffective, we find its argument neither fully developed nor convincing. We therefore hold that because the preference in the amended act is ineffective, Lac Vieux does not have standing to bring an equal protection challenge to the amended act.

B. Standing to Bring First Amendment Claim

1. The Detroit Ordinance

Lac Vieux presents a facial challenge to the city ordinance and the amended act on the basis that they grant preferences to particular entities as a reward for content-based political speech. Lac Vieux asserts that under the standing principles set forth in *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755-56, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988), and other First Amendment cases, it need not have participated in the competitive bidding process to bring a facial challenge. The defendants and intervenors disagree and argue that the First Amendment is not implicated. Furthermore, they argue that even if the First Amendment is implicated, the principles enunciated in *Plain Dealer* do not apply in this case and that a facial challenge is inappropriate. The district court found that neither the act nor the ordinance implicates the First Amendment and therefore did not address standing in the First Amendment context, concentrating instead on Lac Vieux's standing to bring its equal protection claim. We conclude that this is indeed a First Amendment case, and we therefore find it necessary to address the standing issue as it applies in the First Amendment context separately from Lac Vieux's standing to bring its equal protection claim.

"In the First Amendment arena . . . especially when there is a possibility that, rather than risk punishment for his conduct in challenging the statute, [an individual] will refrain from engaging further in the protected activity, courts have been willing to relax prudential standing limitations and permit a third party to assert the rights of a person not otherwise before the court. Even in such situations, however, a court must still consider whether

the third party has sufficient injury-in-fact to satisfy the Art[icle] III . case-or-controversy requirement." *Greater Cincinnati Coalition for the Homeless v. City of Cincinnati,* 56 F.3d 710, 718 (6th Cir. 1995) (internal quotes and citations omitted). Lac Vieux has standing to bring a First Amendment claim because it established the elements set forth in *Lujan* as necessary to show a "case or controversy" and overcome constitutional limitations on standing. As discussed above in the context of Lac Vieux's equal protection claim, Lac Vieux's injury in fact is the disadvantage it faced in the bidding process because it did not support a particular side of a particular political issue.

Furthermore, given the First Amendment context here, a facial challenge is appropriate, and any need for Lac Vieux to participate in the allegedly unconstitutional bidding process in order to establish standing is obviated. *See Plain Dealer,* 486 U.S. at 755-56, 108 S.Ct. 2138 ("[W]hen a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license."). The case now before us does not involve the typical licensing scheme envisioned by the Court in *Plain Dealer,* but it is certainly analogous and, therefore, helpful to our analysis. Although typical licensing schemes often involve prior restraint, which in its common form is not an issue in this case, both licensing regulations and the legislation before this court impose a burden on certain individuals or entities based on the content of their speech. It is this type of burden – a burden that is based on the content of one's speech and, thus, may have a chilling effect on that speech – with

which the Supreme Court in *Plain Dealer* was particularly concerned:

> [W]e have previously identified two major First Amendment risks associated with unbridled licensing schemes. [One of those is] self-censorship by speakers in order to avoid being denied a license to speak. . . . It is when statutes threaten these risks to a significant degree that courts must entertain an immediate facial attack on the law. Therefore, *a facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech* by suppressing disfavored speech or disliked speakers.

Id. at 759, 108 S.Ct. 2138 (emphasis added).

The ordinance does create a substantial risk that parties will self-censor, thereby chilling speech. In this case the "chilling effect" arises because the statute limits the ability of persons or entities to take a particular political position freely, whether that position may be to support or to oppose a particular proposal or to remain neutral, without fear of being burdened in a subsequent bidding process for having supported the wrong side, or even for having supported *no* side of the given issue. The Court found in *Plain Dealer* that a facial attack is appropriate and a plaintiff need not actually participate in the licensing or selection process when this type of chilling effect arises.

Furthermore, the city ordinance does "give[ ] a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." *Id.* Pursuant to the ordinance, the Mayor and the City

Counsel must grant a preference to certain entities because those entities took a particular view on a political issue. These officials not only have the "power" to discriminate based on the viewpoint of political speech, they are required to do so by law.

We conclude that the principle established in *Plain Dealer* in the context of licensing laws, that a facial challenge should lie when a "law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers," *id.*, also applies in this context, where the statute grants a preference to certain entities because they took a particular view on a particular political issue. Therefore, a facial challenge is appropriate in this case, and the fact that Lac Vieux did not actually participate in the competitive bidding process is not an obstacle to establishing standing.

In addition, prudential concerns also dictate that the court should hold that Lac Vieux has standing to bring a facial First Amendment challenge to the city ordinance. This legislation would award lucrative contracts pursuant to a statute that explicitly provides preferences to entities that provided political support for that statute. Were we to affirm the decision below without granting standing and addressing the merits, it is likely that no other party would have standing to challenge the ordinance, and the decision below could be interpreted to stand for the proposition that this type of legislation is constitutional.

We therefore hold that Lac Vieux does have standing to bring a facial First Amendment challenge to the ordinance because it was disadvantaged in the bidding process and therefore chose not to participate.

2. The Amended Act

As we noted above in discussing standing in the equal protection context, the language of the amended act seems to render the preference ineffective. Of course, if the preference is ineffective, then there is no injury. Again, we are obligated to recognize that Lac Vieux does not have standing to bring a First Amendment challenge to the amended act. The district court's ruling on this question was therefore correct, if not its reasoning.

II. First Amendment

Lac Vieux argues that the district court erred in finding that the First Amendment is not implicated in this case. Lac Vieux contends that the city ordinance rewarded Atwater Entertainment and Greektown Casino for having engaged in political speech and burdened all other developers for having taken a different political position or for not speaking at all.[1] The defendants and intervenors argue that the preferences embedded in the ordinance are "merely economic incentive provisions," and that they do not implicate the First Amendment.

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[1] The district court's opinion significantly misconstrues Lac Vieux's First Amendment claim. The district court's opinion states that "Lac Vieux appears to allege that it fought against gambling in Detroit" and the district court's analysis relies heavily on the fact that this claim is not supported in the record. The court notes that the record does not indicate "a specific or general opposition" to the initiatives by Lac Vieux, and therefore concludes that there is "no basis in the record for saying that [Lac Vieux] was discriminated [sic] based upon its political viewpoint or speech." In fact, Lac Vieux contends that it was discriminated against not for opposing the initiative but for failing to actively promote or significantly support the initiatives.

The law is clear that a regulation, such as the city ordinance at issue here, may implicate the First Amendment even if the regulation does not directly prohibit or limit speech. *See Laird v. Tatum,* 408 U.S. 1, 11, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972) ("[C]onstitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights."). Furthermore, the government "may not deny a benefit to a person on a basis that infringes his constitutionality [sic] protected interests – especially his interest in freedom of speech." *Perry v. Sindermann,* 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). This principle has recently been reaffirmed by the Supreme Court in *O'Hare Truck Service, Inc. v. City of Northlake,* 518 U.S. 712, 116 S.Ct. 2353, 135 L.Ed.2d 874 (1996), and *Board of County Comm'rs v. Umbehr,* 518 U.S. 668, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996).

Although the city ordinance in this case does not directly prohibit or limit speech, it does implicate the First Amendment. The ordinance grants benefits and imposes burdens according to whether an individual or entity sufficiently supported a particular political issue. Specifically, it grants a preference to developers who initiated a prior local casino gaming proposal and "actively promot[ed] and significantly support[ed] a state initiative authorizing gaming."[2] Detroit City Code § 18-13-6. The

[2] This preference comes into play three times in the course of the competitive bidding process: during the design of the Request for Proposals by the City, during the Mayor's evaluation of the proposals, and during the city council's review of the mayor's determination.

ordinance thereby denies a preference in the bidding process to certain developers on the basis of the content of their political speech, a category of speech which has been specifically recognized by the Supreme Court as particularly valuable and thereby carefully protected. *See, e.g., Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). It does not matter that the ordinance involves prior speech rather than prospective speech or a preference rather than a guarantee, because it imposes a burden based on the content of political speech and, therefore, implicates the First Amendment.

The First Amendment does not, however, preclude all regulation of speech. The right to free speech must be weighed against government and public interests. The appropriate test to be applied in conducting this balancing depends on the type of regulation at issue. When speech is regulated because of its content, that regulation will be subject to strict scrutiny review, unless the speech falls within certain unprotected categories of speech. *See R.A.V. v. City of St. Paul,* 505 U.S. 377, 382-383, 403, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). Under strict scrutiny review, the government bears the burden of showing that its regulation is "necessary to serve a compelling state interest" and that it is "narrowly drawn to achieve that end." *Id.* By contrast, when the regulation in question is intended to further some other interest, and only incidentally interferes with free speech or free expression, the regulation will be subject to a lesser standard of review. Time, place, and manner restrictions, for example, would fall within this second category of regulation. *See Frisby v. Schultz,* 487 U.S. 474, 481, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) (quoting *Perry Local Educators' Assn.,* 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)).

Although the district court and the parties have provided little guidance on the question, principally because the district court did not reach this issue, we conclude that the ordinance is content-based and is therefore subject to strict scrutiny. The government must therefore show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. Precisely because the district court found that the First Amendment was not implicated and never reached this level of analysis, the defendants have not had the opportunity to make a showing that this regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. We therefore remand this case to the district court for further proceedings. We note that if the preference provisions are held to be unconstitutional, the district court will need to determine whether the offending provisions are severable from the remainder of the ordinance.

III. Equal Protection

Lac Vieux claims that the ordinance, by awarding preferential treatment to Atwater Entertainment and Greektown Casino because of the content of their political speech, denies Lac Vieux the equal protection of the laws of Michigan, in violation of the Fourteen Amendment to the United States Constitution and Article I, Section 2 of the Constitution of the State of Michigan. On appeal, Lac Vieux alleges that the district court erred in applying rational basis review in determining the merits of the equal protection claim.

A statute challenged on equal protection grounds will be subject to strict scrutiny when the statute involves a

"suspect" classification or has an impact on a "fundamental" right. *See Clark v. Jeter,* 486 U.S. 456, 461, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988) ("Classifications based on race or national origin and classifications affecting fundamental rights are given the most exacting scrutiny."). If the statute does not involve a suspect classification or affect a fundamental right, then it will be subject to rational basis review. *See Heller v. Doe,* 509 U.S. 312, 319-20, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) ("[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.").

The district court found that the ordinance did not implicate the First Amendment, or any other fundamental right for that matter, and therefore applied rational basis review. However, in view of our holding that the ordinance does affect rights under the First Amendment, it follows that it is subject to strict scrutiny review – because it implicates a constitutionally protected fundamental right, the right to freedom of speech. *See Carey v. Brown,* 447 U.S. 455, 461-62, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980) ("When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized."); *Chicago v. Mosley,* 408 U.S. 92, 99, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972) ("Because picketing plainly involves expressive conduct within the protection of the First Amendment, discriminations among pickets

must be tailored to serve a substantial governmental interest."); *Williams v. Rhodes,* 393 U.S. 23, 31, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968) ("'[O]nly a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.'") (quoting *NAACP v. Button,* 371 U.S. 415, 438, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963)).

As in the First Amendment context, however, the defendants have not had the opportunity to try to show that the ordinance meets this test. We thus direct that the district court address this issue on remand.

CONCLUSION

For the reasons set out above, we conclude that the district court's judgment must be AFFIRMED in regard to the denial of standing to bring First Amendment and equal protection challenges to the amended act, but REVERSED as to standing to bring First Amendment and equal protection challenges to the city ordinance. We also REVERSE the judgment as to the merits of both the First Amendment and equal protection claims and REMAND the case for further proceedings consistent with this opinion.

General Docket
US Court of Appeals for the Sixth Circuit

Court of Appeals Docket #: 02-1893 Filed: 7/24/02
Nsuit: 3440 Civil Rights: Other
Lac Vieux Desert v. Detroit, et al
Appeal from: Western District of Michigan at Marquette

Case type information:

1) civil
2) private
3) civil rights

Lower court information:

District: 0646-2 : 97-00067
Court Reporter: Kevin Gaugier
Trial Judge: Robert Holmes Bell,
Chief District Judge
Date Filed: 2/26/97
Date order/judgment: 7/11/02
Date NOA filed: 7/16/02

Fee status: paid

Prior cases:

97-2249 DAN EES
Date filed: 12/2/97 Date disposed: 4/12/99
Disposition: arg

Current cases:

	Lead	Member	State	End
Cross-appeal:				
	02-1893	02-1996	8/15/02	

02-1893 Lac Vieux Desert v. Detroit, et al

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, a federally recognized Indian Tribe Plaintiff-Appellant	Conly J. Schulte FTS 333-4761 402-333-4053 [COR LD NTC ret] Shilee T. Mullin FTS 333-4761 402-333-4053 [COR NTC ret] Shilee T. Mullin (See above) [COR NTC ret]

* * *

02-1893 Lac Vieux Desert v. Detroit, et al

2/18/03 Appellant RESPONSE in opposition filed regarding a motion to intervene [2690844-1]; previously filed by Carl G. Becker, for proposed intervenor Detroit, Detroit L.L.C. Response from Conly J. Schulte for Appellant Lac Vieux Desert. Certificate of service date 2/17/03. [02-1893, 02-1996] (dtk) [02-1893 02-1996]

2/18/03 Appellee RESPONSE in opposition filed regarding a motion to intervene [2690844-1]; previously filed by Carl G. Becker, for proposed intervenor Detroit, Detroit, L.L.C. Response from Michael H. Perry for Appellees. Certificate of service date 2/17/03 [02-1893, 02-1996] (dtk) [02-1893 02-1996]

2/18/03 Appellee RESPONSE in opposition filed regarding a motion to intervene [2690844-1]; previously filed by Carl G. Becker, for proposed intervenor Detroit, Detroit, L.L.C.. Response from Peter H. Ellsworth for Appellee MGM Grand. Certificate of service date 2/18/03 [02-1893, 02-1996] (dtk) [02-1893 02-1996]

2/18/03 Appellee RESPONSE in opposition filed regarding a motion to intervene [2690844-1]; previously filed by Carl G. Becker, for proposed intervenor Detroit, Detroit, L.L.C.. Response from John D. Pirich and Bruce R. Greene for Appellee Greektown Casino and Atwater Entertain. Certificate of service date 2/17/03 [02-1893, 02-1996] (dtk) [02-1893 02-1996]

2/18/03 Briefing Letter Sent by CONFERENCE ATTORNEY'S OFFICE resetting cross appeal briefing schedule: first brief due 3/24/03; second due 4/23/03; third due 5/23/03; fourth due 6/6/03; joint appendix due 6/13/03; all finals due 7/7/03. [02-1893; 02-1996] (trm) [02-1893 02-1996]

2/24/03 REPLY filed to Atwater Entertainment, and Greektown Casinos response to the motion to intervene filed by Detroit, Detroit LLC. Response from Carl G. Becker for Detroit Detroit LLC. Certificate of service date 2/24/03. [02-1893, 02-1996] (dtk) [02-1893 02-1996]

3/3/03 Appellant MOTION filed to file a late response to Detroit, Detroit LLC's reply to Atwater Enter., and Greektown Casino LLC's response to Detroit Detroit LLC's motion to intervene. Motion filed by Conly J. Schulte for Appellant Lac Vieux Desert. Certificate of service date 2/28/03 [02-1893, 02-1996] (dtk) [02-1893 02-1996]

3/3/03 Supplemental REPLY filed in favor of Detroit, Detroit LLC's motion to intervene [2690844-1] previously filed by Carl G. Becker for proposed intervenor Detroit, Detroit LLC.

* * *

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, a federally recognized Indian Tribe,

Plaintiff-Appellant,

v.

THE CITY OF DETROIT, MICHIGAN, KWAME KILPATRICK, MARY ANN MAHAFFEY, KENNETH V. COCKREL, JR., SHEILA COCKREL, BRENDA M. SCOTT, SHARON MCPHAIL, ALBERTA TINSLEY-TALABI, ALONZO W. BATES, BARBARA ROSE COLLINS and KAY EVERETT,

Defendants-Appellees,

and

GREEKTOWN CASINO, LLC, MGM GRAND DETROIT, LLC and DETROIT ENTERTAINMENT, LLC.

Intervenor/Defendants-Appellees

Case No. 02-1893: 02-1996

/

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/

SUPPLEMENTAL REPLY IN FAVOR OF DETROIT, DETROIT, L.L.C.'S MOTION TO INTERVENE

(Filed Mar. 8, 2003)

* * *

INTRODUCTION

Detroit, Detroit, L.L.C. (hereinafter "Detroit LLC") filed a timely Reply in the instant motion on February 24, 2003. However, since that time, it has been served with responses from Appellant, Lac Vieux Desert Band of Lake Superior Chippewa Indians (hereinafter "LV") and MGM Grand Detroit, LLC (hereinafter "MGM"). Much of those responses are dedicated to the timeliness of Detroit LLC's Motion to Intervene and Detroit LLC's standing.[1]

TIMELINESS

MGM is objecting to Detroit LLC's Motion to Intervene based on timeliness when it only became an Intervening Defendant in April of 2002. (MGM Response page

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[1] It is worth noting that much of the argument against Detroit LLC having standing is based on a Consent and Release signed by all potential casino developers with the City of Detroit. The City of Detroit is the only party which may raise that Release as a bar to Detroit LLC's Motion but the City has chosen not to do so. This issue is fully briefed in Detroit LLC's Reply filed on February 24, 2003. LV and MGM stand in the same position as the other parties that have filed a response to the instant motion.

As with the other Response filed in this matter, MGM and LV have made gross mischaracterizations of the impact of the Release on constitutional issues. This Court has unequivocally stated "insistence upon execution of the Release as a condition of participation in the selection process may or may not be constitutional . . . " *Bardon Detroit Casino, L.L.C. v. The City of Detroit*, 230 F.3rd 848, 855 (6th Cir. 2000).

6). That intervention by MGM tends to nullify any argument that Detroit LLC should have attempted to intervene six years ago at the onset of this litigation. Six years ago, MGM was also aware of the instant litigation. Six years ago, presumably, MGM also signed a release. Six years ago, MGM knew that if LV was successful its permanent license at a minimum was voidable.

However, MGM chose not to intervene until four months after the preference section of the Detroit City Ordinance was ruled unconstitutional in January of 2002. See *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. The Michigan Gaming Control Board, et al.*, 276 F 3d 876, 879 (6th Cir. 2002). MGM became an intervening party only three months prior to Detroit LLC filing its Motion to Intervene in the District Court and after this lawsuit had already been appealed to the Sixth Circuit twice. In light of the fact that the briefing schedule in this Court has been adjourned several times due to the mediation process, it is hard for anyone to argue that Detroit LLC causes prejudice to this matter any more than MGM causes prejudice to this matter when it joined the litigation less than a year ago.

Absolute measures of timeliness should be ignored. *Stupak-Thrall v. Glickman*, 226 F. 3d 467, 475 (6th Cir. 2000); *Sierra Club v Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994). In fact, the Western District of Michigan has not hesitated to grant intervention in the past despite the passage of months and even years. *Usery v Brandel*, 87 F.R.D. 670, 674 (Western District of Michigan 1980) (In *Usery* the Court granted applicant's motion despite the fact it was filed ten months after the complaint and an additional fourteen months elapsed before the court received the applicant's supporting brief. See also, *Mountain Top*

Condo Ass'n v Dave Stabbert Master Builder, Inc., 72 F. 3d 361, 370 (3rd Cir. 1995) (Court allowed intervention as of right where four years had passed between the filing of the complaint and the motion to intervene).

In the matter at hand, although approximately a year has passed since the preference of the Detroit City Ordinance was ruled unconstitutional, and only nine months has elapsed since MGM was allowed to intervene in this matter, as in *Usery* "such mere passage of time . . . does not of itself render the application untimely". *Usery* at 674.

In the instant matter, Detroit LLC, in regard to timeliness, stands similarly situated to MGM in that there will be no prejudice to the other parties. Detroit LLC, with the extended Briefing Schedule, is easily able to assimilate itself into the case. Even as a case moves towards trial [final resolution] "intervention should not be denied if another party could be readily assimilated into the case". *Usery* at 675.[2]

It is worth noting that the opposing parties are criticizing Detroit LLC having waited until its rights were not adequately protected by the current parties, however, MGM also did not bring its motion until it felt its rights were not adequately protected and a decision by the Court could affect its interest. MGM came into the case after LV made it clear that at least one of the remedies is sought

[2] Movant acknowledges that the *Usery* matter was in the early stages of discovery, however, the principles still apply since Detroit LLC can be readily assimilated and just as easily provide a brief to this court in a timely manner as other intervenors to this matter and the original parties.

was new bidding as to everyone, and MGM perceived that since it was not a preference choice finalist it had a different interest than the other finalists to protect. Now that LV and the defendants are negotiating money as the sole solution to LV instead of rebidding Detroit, LLC realizes that positions have shifted and it now has its particular position to protect. Nobody opposed MGM despite the fact that MGM allowed four months to elapse from the January, 2002 ruling before it filed its Motion to Intervene.

STANDING

The standards for having proper standing have been adequately briefed in the other pleadings regarding this Motion and will not be repeated herein. However, it is worth comparing Detroit LLC's interest in this matter with that of MGM. MGM became involved in this matter by way of intervention because it had a perception that its interest might be different than the interest of the other intervening casinos. MGM's perception is simply that, a perception, and there is not a guaranteed concrete difference. Nobody objected to the MGM intervention for the patently obvious reason that MGM's economic strength would give the other intervening defendants financial wherewithal to potentially deal with the litigation and assist in any closure to it. This despite the fact that MGM all along had standing. Compare that to Detroit LLC, which did not have standing until January, 2002. Detroit, LLC filed its motion to intervene only 90 days after MGM. Unfortunately, almost concurrent with Detroit LLC's filing in the District Court, the matter went up on appeal and the District Court lost jurisdiction.

Just like MGM, Detroit LLC stayed in tune to what was going on in the case, had discussions with LV and other parties and was satisfied, at all stages, that this matter would be handled fairly and appropriately. Even after the District Court ruled that no new bidding procedures were appropriate and that only attorney fees were awardable to LV, due to its hard work there was no perception that LV would have any interest other than working for a meaningful remedy to rectify the unconstitutional preference. However, this Court's own mediation process placed LV and others in an entirely different perspective since economics and money rather than remedy seemed to take the order of the day and it became obvious that the interest of LV and Detroit LLC were becoming divergent.

The casinos believe that the problem with the unconstitutional preference should not be rectified and that money could rectify any of LV's problems, however, that would not rectify all the other "ready and able" applicants who are affected by the unconstitutional preference.[3] There are obviously thousands of potential variations and remedies that could be fashioned. MGM makes an interesting argument at the end of its Brief that if a remedy is fashioned, why does Detroit LLC need to participate when it will be treated like everybody else. (See page 12 of MGM's Response Brief.) That is an assumption without

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[3] LV were not participants in the original bidding process but were determined by this Court to be "ready and able" to participate and thus had standing. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board*, 172 F. 3d 397, 406 (6th Cir. 1999).

any basis in fact. Bidding could take almost any form, wide open bidding, bidding only by parties who were ready and able to participate back when the process originally occurred, bidding by "ready and able" and the original eleven developers, bidding by something less than that based upon second or final round selections as well as the net worth of applicants, track records, etc.

It is interesting that MGM, a party that waited five years to intervene in this matter, claims that a three year Statute of Limitations applies. Such a conclusion is without merit. Detroit LLC is not claiming that there was an injury to a person or property, but rather it lost out on the expectation of being able to fairly bid on a casino license. In Michigan, when there is no claim of injury to person or property, but rather future expectations, a six year Statute of Limitations applies. *Borman's Inc. v Lake State Development Co., et al*, 60 Mich. App. 175, 188-189 230 NW 2nd 363, 370-371 (1975); *Schenburn v Lehner Associates, Inc.*, 22 Mich. App. 534, 177 NW 2nd 699 (1970); MCLA 600.5807(8).

CONCLUSION

The objecting parties in this matter do not want Detroit LLC to intervene because it appears to be their hope that money will make this constitutional issue go away. Detroit LLC wants to intervene for precisely that reason. This Court's mediation process ostensibly began in August of 2002 and approximately five months thereafter Detroit LLC filed its Motion to Intervene similar to MGM which waited four months after the January, 2002 ruling to file its Motion. Detroit LLC should be allowed to

intervene as it now appears that its interest will not be adequately represented.

WHEREFORE, DETROIT, DETROIT, LLC prays that this Honorable Court allow it to be an intervening party to this lawsuit and grant such other and different relief as just and equitable.

Respectfully submitted,

BECKER & WASVARY, P.L.L.C.

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Dated: March 3, 2003

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No. 03-5

IN THE

Supreme Court of the United States

DETROIT, DETROIT, L.L.C.,

Petitioner,

v.

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, a federally recognized Indian Tribe, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT MGM GRAND DETROIT, L.L.C.

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QUESTION PRESENTED

Whether this Court should grant a petition for a writ of certiorari where the Petitioner fails to demonstrate that the U.S. Court of Appeals for the Sixth Circuit clearly abused its discretion in denying a motion to intervene into appellate proceedings, which motion was filed in the Sixth Circuit at a time when: (1) the case was over six years old; (2) the case was before the Sixth Circuit for the third time; (3) more than a year had passed since Petitioner clearly knew its interests may be implicated in the case; and (4) nearly seven months had passed since the third appellate proceeding had been initiated.

CORPORATE DISCLOSURE STATEMENT

MGM Grand Detroit, L.L.C. is a Delaware L.L.C. that is 97% owned by MGM Grand Detroit, Inc., a Delaware corporation, which in turn is 100% owned by MGM Grand Resorts, L.L.C., a Nevada L.L.C., which is in turn 100% owned by MGM MIRAGE, a Delaware corporation (a publicly held company).

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Pursuant to Supreme Court Rule 15, Respondent MGM Grand Detroit, L.L.C. ("MGM") opposes Detroit, Detroit, L.L.C.'s ("Detroit, L.L.C.") petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.[1] The Sixth Circuit denied Detroit, L.L.C.'s motion to intervene on appeal as untimely, and Detroit, L.L.C. fails to demonstrate that the Sixth Circuit clearly abused its discretion in denying Detroit, L.L.C.'s motion. As a result, this Court has no jurisdiction over this matter, and Detroit, L.L.C.'s petition must be denied.

STATEMENT OF THE CASE

A. The Underlying Case

The case into which Detroit, L.L.C. seeks to intervene was initiated over six years ago, in February 1997. At that time, plaintiff Lac Vieux Desert Band of Lake Superior Chippewa Indians ("LVD") filed a complaint in the United States District Court for the Western District of Michigan. LVD's complaint challenged, on state and federal grounds, certain provisions of the Michigan Gaming Control and Revenue Act ("MGCRA"), Mich. Comp. Laws Ann. § 432.201, *et seq*. Because LVD sought relief implicating directly the interests of casino developers Atwater Entertainment Associates, L.L.C. ("Atwater") and Greektown Casino, L.L.C. ("Greektown"), they intervened within weeks of the filing of LVD's complaint.

Under MGCRA, in order to apply for a license from the State of Michigan to construct and operate a casino, a casino

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1. Detroit, L.L.C. fails to list MGM as a respondent. It also fails to include Atwater Entertainment Associates, L.L.C. as a respondent.

developer must have a certified development agreement with the City of Detroit ("the City"). Mich. Comp. Laws Ann. § 432.206(1)(b). The City may certify up to three development agreements. Mich. Comp. Laws Ann. § 432.206(2).

The City passed a Casino Development Competitive Selection Process Ordinance (the "Selection Ordinance") in mid 1997 in order to provide guidelines and criteria for: (1) the Mayor's selection of three developers that would be granted permission to construct and operate casinos in the City; and (2) the City Council's approval of development agreements negotiated by the Mayor and the selected developers. Provisions within the Selection Ordinance made Atwater and Greektown eligible for a preference based on their prior political activities supporting casino gambling in the City. Detroit City Code § 18-13-6.

In summer 1997, various developers interested in the construction and operation of casinos were invited to submit to the City proposals for casino developments. Detroit, L.L.C. participated in that bidding process. However, Detroit, L.L.C. was eliminated after the first of three rounds, well before any final selection was made and well before the application of any preference to any developer.

First in August 1997 and again in October 1997, LVD amended its complaint to include challenges to the Selection Ordinance. However, LVD did nothing to stop the final selection of casino developers under the Selection Ordinance. In November 1997, the Mayor announced his selection of three casino developers: Detroit Entertainment, L.L.C. (a combination of Atwater and Circus Circus Michigan, Inc.), Greektown, and MGM. LVD also did nothing to stop the

negotiation of, or the City Council's consideration and approval of, development agreements between the City and the selected developers. The development agreements were approved by the City Council in April 1998.

LVD's claims were initially dismissed by the district court, and LVD appealed. The Sixth Circuit affirmed in part and reversed in part, holding that LVD had standing to pursue its Equal Protection and First Amendment claims against the Selection Ordinance. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, 172 F.3d 397 (6th Cir. 1999) ("*Lac Vieux I*").

On remand after the Sixth Circuit's decision, LVD sought to join MGM as a party on May 21, 1999. MGM was not eligible for any preference within the Selection Ordinance, and was selected solely on the merits of its proposal.[2] LVD's motion to join MGM was denied by the district court on October 25, 1999.

The district court subsequently also denied LVD's motion for partial summary judgment, holding that the Selection Ordinance's preference provisions did not violate the First

2. Contrary to Detroit L.L.C.'s unsupported claims, MGM did not "present[] its development agreement to the city as a package which would be tied to the two preferred entities, thereby essentially assuring MGM that it would receive the one remaining license. . . ." (Petition at 3). MGM was selected by the Mayor of Detroit without regard to the preference. MGM's development agreement was voted on separately by, and was approved by the majority of, the Detroit City Council. There is no evidence in the record in this case that MGM "skewed its development agreement in order to tie it to the preference" (Petition at 3), or that MGM sought specific contractual provisions in order to receive the benefit of any preference provision within the Selection Ordinance.

Amendment. That decision was also appealed. On January 15, 2002, the Sixth Circuit, in a split decision, reversed. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board*, 276 F.3d 876 (6th Cir.), *cert. denied*, 536 U.S. 923, 122 S. Ct. 2589, 153 L. Ed. 2d 779 (2002) ("*Lac Vieux II*"). The case was again remanded.

Upon remand for the second time, the district court entered an order on February 7, 2002 which declared the Selection Ordinance "in its current form" unconstitutional. The district court also directed the parties to inform the court as to outstanding issues that required resolution. LVD filed a response. In addition, on March 13, 2002, LVD filed a separate motion seeking further equitable relief. By this later motion, LVD specifically sought an order requiring that a new selection process be conducted, and orders declaring all three developers' casino licenses and development agreements void.

Because LVD's motion for further relief directly implicated MGM's interests, MGM sought, on April 12, 2002, leave to intervene into the case. MGM's motion was granted by the district court on April 17, 2002. Unlike MGM, Detroit, L.L.C. did nothing at the time to intervene into the case.

The district court denied LVD's motion for further relief on July 9, 2002.[3] LVD filed a notice of appeal on July 16, 2002.

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3. The district court concluded that "MGM was not eligible for, did not seek, and did not receive any preferential treatment in the casino selection process. MGM was as much a victim of the preference provision as was Plaintiff." *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, Case No. 2:97-CV-67, 2002 WL 1592596 (W.D. Mich. July 9, 2002), at *11.

B. Detroit, L.L.C.'s Belated Attempt To Intervene In The District Court

Detroit, L.L.C. filed in the district court a motion to intervene on July 22, 2002, six days after LVD filed its notice of appeal. Because the district court no longer had jurisdiction of the case, Detroit, L.L.C. subsequently filed a notice requesting that its motion to intervene be withdrawn. The motion was withdrawn on August 6, 2002, when the district court granted Detroit L.L.C.'s request.

C. Detroit, L.L.C.'s Motion To Intervene Into Appellate Proceedings

Detroit, L.L.C. waited until February 6, 2003 – nearly seven months after LVD filed its notice of appeal – to file in the Sixth Circuit a motion to intervene as a plaintiff-appellant. By February 2003, the existing parties had been engaged in court-ordered mediation for nearly five months. Detroit, L.L.C.'s motion stated that its reason for seeking intervention was because it "was concerned that if it does not intervene at this time, that resolutions could be had whether by judicial ruling or settlement that bar relief that would be specifically appropriate for it and other participants who made substantial monetary and time commitments to a casino bidding procedure which [the Sixth Circuit] has now found to be unconstitutional." (Detroit L.L.C.'s Motion to Intervene at ¶ 9). LVD, Detroit Entertainment, L.L.C., MGM, Atwater, and Greektown filed briefs opposing Detroit, L.L.C.'s motion.

The Sixth Circuit on March 28, 2003 denied Detroit, L.L.C.'s intervention motion, concluding that the motion was not timely.

ARGUMENT

The case into which Detroit, L.L.C. sought to intervene is over six years old. Well before this case was brought to the Sixth Circuit for the third time, Detroit, L.L.C. was aware that its interests may be implicated in the case. Rather than move to intervene in the district court when LVD made clear that it was seeking an order for a new bidding process, Detroit, L.L.C. waited for over a year and then filed its motion in the Sixth Circuit. Detroit, L.L.C. fails to demonstrate that the Sixth Circuit clearly abused its discretion in denying Detroit, L.L.C.'s motion to intervene as a plaintiff into ongoing appellate proceedings and, as a result, its petition must be denied.

A. An Appellate Court's Decision As To A Motion To Intervene In Appellate Proceedings Is Discretionary And Is Reviewed For Clear Abuse Of Discretion

Detroit, L.L.C. claims entitlement to intervention as of right under Fed. R. Civ. P. 24(a). (Petition at i, 7). "The Federal Rules of Civil Procedure, of course, apply only in the federal district courts." *International Union, UAW, Local 283 v. Scofield*, 382 U.S. 205, 217 n.10, 86 S. Ct. 373, 15 L. Ed. 2d 272 (1965); *see also* Fed. R. Civ. P. 1. Procedure in the United States Courts of Appeals is governed by the Federal Rules of Appellate Procedure. Fed. R. App. P. 1(a). There is no rule of appellate procedure governing intervention motions filed with a Court of Appeals in a case such as this one.[4] Thus, unlike the Federal Rules of Civil Procedure, no "intervention of right" is provided in the Federal Rules of Appellate Procedure.

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4. In cases involving review or enforcement of agency orders, intervention motions must be filed "within 30 days after the petition for review is filed." Fed. R. App. P. 15(d).

As a result, intervention into appellate proceedings is permissive only. Under applicable case law, "[a] court of appeals *may* allow intervention at the appellate stage where none was sought in the district court only in an exceptional case for imperative reasons." *Amalgamated Transit Union Int'l, AFL-CIO v. Donovan*, 771 F.2d 1551, 1552 (D.C. Cir. 1985) (per curiam) (emphasis added; internal quotation marks and citations omitted), *cert. denied sub nom. Metropolitan Atlanta Rapid Transit Authority v. Amalgamated Transit Union Int'l*, 475 U.S. 1046, 106 S. Ct. 1262, 89 L. Ed. 2d 572 (1986).[5] Thus, courts of appeals have discretion in allowing persons not parties to join an ongoing appeal. *See Hall*, 117 F.2d at 1230.

After consideration of various factors relevant to the intervention decision, the Sixth Circuit denied Detroit, L.L.C.'s motion as untimely. (*See* Order, Appendix A to Petition, at 3a). Because intervention into ongoing appellate proceedings is left entirely to the discretion of courts of appeals, the Sixth Circuit's decision can *only* be reviewed for clear abuse of discretion. *See Allen Calculators, Inc. v. National Cash Register Co.*, 322 U.S. 137, 142, 64 S. Ct. 905, 88 L. Ed. 1188 (1944) ("The exercise of discretion in a matter of this sort is not reviewable by an appellate court unless clear abuse is shown . . .").

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5. *See also In re Grand Jury Investigation Into Possible Violations Of Title 18*, 587 F.2d 598, 601 (3d Cir. 1978); *McKenna v. Pan Am. Petroleum Corp.*, 303 F.2d 778, 779 (5th Cir. 1962); *Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997); *Hutchinson v. Pfeil*, 211 F.3d 515, 518 (10th Cir.), *cert. denied*, 531 U.S. 959, 121 S. Ct. 384, 148 L. Ed. 2d 296 (2000); *Hall v. Holder*, 117 F.3d 1222, 1231 (11th Cir. 1997).

Detroit, L.L.C. asserts that review of the Sixth Circuit's denial of its motion to intervene should be *de novo*.[6] (Petition at 6). To support this contention, Detroit, L.L.C. relies on *Bose Corp. v. Consumers Union of United States, Inc.* 466 U.S. 485, 499, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984).

Bose is inapposite. *Bose* stands for the proposition that a reviewing court faced with a lower court determination on the merits of a First Amendment claim must conduct an independent review of a lower court's findings with respect to whether the speech at issue is protected by the First Amendment. *See Bose*, 466 U.S. at 511. The Sixth Circuit in *Lac Vieux II* decided the First Amendment issues that were raised in this case, and this Court denied certiorari. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board*, 276 F.3d 876 (6th Cir.), *cert. denied*, 536 U.S. 923 (2002).

At issue now before the Sixth Circuit is whether the district court properly denied LVD's request for equitable relief beyond the entry of a declaratory judgment. The standard described in *Bose* is inapplicable to that issue. Detroit, L.L.C.'s contention that a *de novo* standard of review applies has no basis and should be rejected.

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6. Had Detroit, L.L.C. obtained a denial on the basis of untimeliness from a district court, appellate review would have been for abuse of discretion. *NAACP v. New York*, 413 U.S. 345, 366, 93 S. Ct. 2591, 37 L. Ed. 2d 648 (1973); *United States v. Tennessee*, 260 F.2d 587, 592 (6th Cir. 2001).

B. The Sixth Circuit's Denial Of Detroit, L.L.C.'s Motion Was Not A Clear Abuse of Discretion

Detroit, L.L.C. also contends that the Sixth Circuit abused its discretion in determining that its motion for intervention was untimely, ostensibly because the court's written opinion was short and to the point.

The Sixth Circuit did not abuse its discretion in denying Detroit, L.L.C.'s motion to intervene. Detroit, L.L.C. simply did not demonstrate that this was "an exceptional case" requiring intervention "for imperative reasons." *Amalgamated Transit Union Int'l, AFL-CIO v. Donovan*, 771 F.2d at 1552.

Detroit, L.L.C. asserts that it has standing to pursue relief against the City. (Petition at 9). Because Detroit, L.L.C. participated in the bidding process and was eliminated well before any preference was applied, Detroit, L.L.C. has no standing to pursue claims for relief against the City. *Barden Detroit Casino, L.L.C. v. City of Detroit*, 230 F.3d 848, 854 (6th Cir. 2000) ("Here the preference established by the Detroit ordinance caused no actual injury to Barden, the preference not having been invoked until after Barden had already been eliminated from the bidding."). Moreover, as was the case for the plaintiff in *Barden*, Detroit, L.L.C. signed a release waiving all claims it had against the City. (*See* Exhibit A to Detroit, L.L.C.'s Motion to Intervene). At least two courts have held this very waiver operates to eliminate the releasor's legal and equitable claims against the City. *Barden Detroit Casino, L.L.C. v. City of Detroit*, 59 F. Supp. 2d 641, 669-670 (E.D. Mich. 1999) ("[T]he Court finds as a matter of law that the Consent and Release bars all of BDC's claims, including the constitutional claims, against the Detroit Defendants."), *aff'd*, 230 F.3d 848 (2000); *NewCentury Detroit L.L.C. v. City of*

Detroit, Case No. 97-75154 (E.D. Mich. June 3, 1998). In order to demonstrate an entitlement to any relief against the City, Detroit, L.L.C. must show that its Release is ineffectual – a claim that it has not made.

Even if Detroit, L.L.C. can claim a legal interest in the outcome of this case, Detroit, L.L.C. waited for a year after it knew its interests may be implicated in this case before it pursued intervention. During that year, LVD raised the issue whether it was entitled to a new selection process, the district court decided the issue, LVD filed a notice of appeal, and the existing parties participated in appellate proceedings. At the time of Detroit, L.L.C.'s motion, the parties had been engaged in court-ordered mediation for five months, and had not yet concluded that process. All briefing in the Sixth Circuit is now complete.

Because there is no rule governing intervention into appellate proceedings in a case such as this one, the Sixth Circuit turned to Fed. R. Civ. P. 24 for guidance.[7] (*See* Order, Appendix A to Petition, at 2a). Contrary to Detroit, L.L.C.'s contention, the Sixth Circuit did not use "the length of time that has passed [as] the sole basis of its decision. . . ." (Petition at 9).

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7. Detroit, L.L.C. relies heavily on Fed. R. Civ. P. 24 and on case law applying that Rule in presenting its arguments before this Court, (*see* Petition at 6, 7, 8, 10, 11), and suggests that the Sixth Circuit committed reversible error in not following the dictates of Rule 24. Procedural decisions in appellate courts are not governed by Fed. R. Civ. P 24, or by its related case law. Courts of Appeals considering intervention motions can, ***but need not***, look to Fed. R. Civ. P. 24 for ***guidance***. ***International Union, UAW v. Scofield***, 382 U.S. at 217 n.10 ("[T]he policies underlying intervention ***may*** be applicable in appellate courts." (emphasis added)). By definition, the use of Rule 24 as guidance cannot be the basis of a claim that an appellate court clearly abused its discretion.

The Sixth Circuit noted that five factors are generally relevant to an assessment of timeliness under Fed. R. Civ. P. 24. (Order, Appendix A to Petition, at 2a-3a). Detroit, L.L.C. contends that "the lower Court did not make any analysis of those factors." (Petition at 8 n.3). Even if procedure in the Sixth Circuit were governed by Fed. R. Civ. P. 24 (which it is not), Detroit, L.L.C.'s contention is meritless. The Sixth Circuit noted "the point to which the suit has progressed" (the first factor), when it considered that the "litigation has been pending for more than six years, with two prior appeals to [the Sixth Circuit.] The district court has now entered a final judgment, which is the subject of this third appeal." (Order, Appendix A to Petition, at 3a).

The Sixth Circuit also noted "the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case" (the third factor). (*Id.* at 2a). Here, the appellate court noted that Detroit, L.L.C. was aware of its interests in the litigation by at least January 2002 – more than a year prior to its filing its motion to intervene into appellate proceedings. (*Id.* at 3a). Detroit, L.L.C. admitted that it could have filed its motion months before it did. (Detroit, L.L.C.'s Motion to Intervene at 9 ["One may argue that Detroit, L.L.C. could have brought its motion before the Court of Appeals in August of 2002 and they would be correct."]).

Because Detroit, L.L.C. has not demonstrated that the Sixth Circuit clearly abused its discretion in denying Detroit, L.L.C.'s intervention motion, this Court has no jurisdiction to review that decision. *See Brotherhood of Railroad Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 525, 67 S. Ct. 1387, 91 L. Ed. 1646 (1947) ("[I]f the matter is one within the discretion of the trial court and if there is no abuse of discretion, the order is not appealable and we lack power to review it."). Thus, Detroit, L.L.C.'s petition must be denied.

CONCLUSION

For the foregoing reasons, Respondent MGM Grand Detroit respectfully requests that this Court deny Detroit, L.L.C.'s petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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CORPORATE DISCLOSURE STATEMENT

Petitioner's Corporate Disclosure Statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that Statement.

INTRODUCTION

The decision of the Sixth Circuit should not be allowed to stand due to the widespread effect it will have on undermining one's ability to protect its rights and, more specifically as it relates to constitutional rights.[1] Further, as set forth in the original Petition to this Court, the Sixth Circuit abused its discretion in denying Petitioner's Motion to Intervene and the Sixth Circuit's decision conflicts with holdings of this Court and other courts as it relates to the timeliness of filing a motion to intervene.

Three Briefs in opposition to the Petition for Writ of Certiorari were filed with this Court by several respondents, although noticeably absent is any response from the City of Detroit which was an original defendant in this lawsuit and a current Appellee in the Sixth Circuit. The importance of this fact is more fully explained below.

The opposition to the Petition for a Writ of Certiorari set forth some misstatements and improperly placed great reliance on the Release between your Petitioner and the City of Detroit executed in 1997.

REASONS FOR GRANTING THE PETITION

Although the Sixth Circuit did not address the issue of standing in its Order (See Appendix A of Petition for

1. In the instant matter, the Sixth Circuit determined that the ordinance at issue was unconstitutional and in violation of the First Amendment Free Speech Clause. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. The Michigan Gaming Control Board, et al.* 276 F.3d 876 at 879 (6th Cir. 2002) (hereinafter "Lac Vieux II").

Certiorari), the Respondents have placed reliance upon a Consent and Release executed by Detroit, Detroit, L.L.C. (hereinafter "Detroit LLC") between Detroit LLC and the City of Detroit.[2]

The only party that was released by Detroit LLC has apparently chosen not to file any sort of opposition to this Petition for a Writ of Certiorari.[3]

There is no mention in the Release of any other beneficiary and, in fact, the Release is specifically limited to:

> The City of Detroit, including all departments, agencies and commissions thereof, and their respective principals, agents, consultants, attorneys, advisors, employees, officers and directors.

(See paragraph 11 of the Consent and Release, Reply App. 4a).

If the Respondents are beneficiaries at all, they are incidental beneficiaries, not direct beneficiaries. Under Michigan law, incidental beneficiaries who are not named in the contract are not entitled to enforce the contract or any of its provisions. *Paul v. Bogle*, 193 Mich. App. 479, 44 N.W. 2d 778 (1992); *Dynamic Construction Co. v. Barton Mallow Co.*, 214 Mich. App. 425, 543 N.W. 2d 31 (1995).

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2. That Consent and Release was attached as Exhibit A to Detroit LLC's Motion to Intervene filed in the Sixth Circuit.

3. It is worth noting that the City of Detroit also did not file a response to Detroit LLC's Motion to Intervene at the Sixth Circuit.

Respondents' attempt to overcome their lack of privity of the Release at issue by citing to the matter of *Barden Detroit Casino, L.L.C. v. City of Detroit*, 230 F.3d 848 (6th Cir. 2000). (See Brief in Opposition for Respondent MGM Grand Detroit, L.L.C., page 9.) The *Barden* decision was made prior to the January 2002 ruling in *Lac Vieux II* which held the Ordinance is unconstitutional. Further, the court in *Barden* stated:

> Insistence upon execution of the Release as a condition of participation in the selection process may or may not be constitutional . . .

Barden Detroit Casino, L.L.C. v. The City of Detroit, 203 F.3d 848, 855 (6th Cir. 2000).

Since the ruling in *Lac Vieux II*, any assumption that the release is valid is most likely contrary to controlling law. "A state actor cannot constitutionally condition the receipt of a benefit . . . on an agreement to refrain from exercising one's constitutional rights, especially one's rights to free expression." *G & V Lounge, Inc. v Michigan Liquor Control Commission,* 23 F 3d 1071, 1077 (6th Cir. 1994), citing to *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694, 2697-98, 33 L. Ed. 2d 570 (1972). Further, one can only waive a known right. *Sambo's Restaurant, Inc. v City of Ann Arbor*, 663 F.2d 686, 693 (6th Cir. 1981). Detroit, L.L.C. did not know it was waiving a constitutional right at the time it signed the release as the ordinance had yet to be ruled unconstitutional.

Several misstatements were made in Respondents' Opposition Briefs, specifically MGM states: "Intervention into appellate proceedings is permissive only." (See Brief in

Opposition for Respondent MGM Grand Detroit, L.L.C., page 7.) This gratuitous statement was made without any case law to support it because, in fact, it is not true.[4] Respondents have not cited any case law, court rule or statutory law prohibiting intervention as of right at the appellate level because, in fact, no such prohibition exists. The Sixth Circuit Order of March 28, 2003 specifically references Federal Rules of Civil Procedure 24 and states:

> The standards for intervention set forth in Fed. R. Civ. P. 24 provide guidance for the exercise of our discretion. Both intervention as of right and permissive intervention require that the application to intervene be timely.

(Petition App A, page 2a.)

Accordingly, the Sixth Circuit recognized that the Appellate Courts look to the Federal Rules of Civil Procedure 24 for guidance and specifically recognize that intervention as of right is a possibility at the Appellate level.

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4. MGM also states that Detroit, LLC failed to list MGM as a respondent along with Atwater Entertainment Associates, L.L.C. (See footnote 1, Brief in Opposition for Respondent MGM Grand Detroit, L.L.C., page 1.) This statement is not true. MGM and Atwater Entertainment Associates were recognized and served with the Petition for a Writ of Certiorari along with all the other respondents as is evidenced by the Proof of Service filed with the Clerk of the Supreme Court of the United States and is evidenced by the fact that MGM and Atwater Entertainment Associates filed a Response.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX — CONSENT AND RELEASE DATED JULY 30, 1997

CONSENT AND RELEASE

(To be signed and delivered by each Proposer, the Proposer's Substantial Owners, its Managers, the Substantial Owners of its Managers, their respective Affiliates and their respective Key Persons.)

WHEREAS, the City of Detroit is soliciting requests for the City of Detroit/Casino Project pursuant to Phase One and Phase Two documents issued by the City of Detroit, together with all alterations, supplements or amendments thereto (collectively, the "RFP/Q").

WHEREAS, to evaluate the personal, business and financial qualifications and professional capabilities and standing of each Proposer, the Proposer's Substantial Owners, Managers, the Substantial Owners of its Managers, their respective Affiliates and their respective Key Persons (each, a "Releasor" and collectively, the "Releasors"), the City of Detroit requires certain information about each Releasor which could be considered confidential and/or proprietary ("information").

WHEREAS, the collection of Information by the City of Detroit is essential to select the highest quality Proposal for the City of Detroit.

WHEREAS, some of the Information may be collected directly or indirectly from the Releasor and/or other Releasors.

WHEREAS, other Information may be collected directly or indirectly from others such as law enforcement agencies, courts, gaming and other regulatory bodies, former employees, and financial sources.

NOW, THEREFORE, the Releasor, in consideration of the City of Detroit's accepting for review, a Proposal in which Releasor has an economic interest and other valuable consideration the sufficiency of which is hereby acknowledged, agrees as follows:

1. The definitions contained in the RFP/Q are incorporated herein by reference.

2. The Releasor hereby consents and agrees to abide by all of the City of Detroit's terms, conditions, rules and policies concerning the RFP/Q.

3. The Releasor agrees that the City of Detroit does not acknowledge or agree that any of the Information is confidential and/or proprietary.

4. Information collected will be used in at least the following ways:

a. To evaluate Releasor's personal, financial and business history;

b. To evaluate Releasor's personal, financial and business integrity, and criminal history, if any; and

c. To evaluate Releasor's professional qualifications and capabilities and demonstrated past performance.

5. The City of Detroit may use the Information in any regulatory decision with respect to involvement in gaming in the City of Detroit and may provide this Information to any existing or new licensing or regulatory body with respect to involvement in gaming in Michigan.

6. Information may be shared with other government agency officials or advisers who may work with the City of Detroit in the RFP/Q evaluation process.

7. The City of Detroit may provide the Information to the Board or any successor or replacement thereto.

8. The City of Detroit and/or the Board may share the Information with other jurisdictions with which it has formal agreements.

9. The City of Detroit may provide such Information to law enforcement agencies for gaming related investigations or clearances.

10. The City of Detroit is controlled by certain statutes of the United States and the State of Michigan and divisions thereof. The Releasor acknowledges that those statutes may provide access by third parties to the Information obtained regarding the Releasor.

11. The Releasor, and his, her or its heirs, executors, administrators, successors and assigns, hereby release the City of Detroit including all departments, agencies and commissions thereof, and their respective principals, agents, consultants, attorneys, advisors, employees, officers and directors (the "Releasees"), and hold each of them harmless from any damages, claims, rights, liabilities, or causes of action, which the Releasor ever had, now has, may have or claim to have, in law or in equity, against any or all of the Releasees, arising out of or directly or indirectly related to the (i) RFP/Q process and the selection and evaluation of Proposals submitted in connection therewith; (ii) release or disclosure of any Information whether intentional or unintentional; and (iii) use, investigation of, or processing of the Information.

12. The undersigned Releasor has read and understands this Consent and Release and hereby authorizes the direct and indirect collection of, and consents to the use and disclosure of the Information as described herein.

Dated: July 30, 1997

By: s/ [illegible]
Name: _____
Title: _____